Office - Supreme Court, U. S.
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APR 27 1954
HAROLD B. WILLEY, Clerk

No. 7130 54

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

—against—

MICHAEL J. REGAN,

Defendant-Appellant.

RECORD ON APPEAL

JULIUS A. HELLENBRAND
Attorney for Defendant-Appellant
161-19 Jamaica Avenue,
Jamaica 32, N. Y.

MILES F. McDONALD
District Attorney, Kings County
Attorney for Respondents
Municipal Building
Brooklyn 2, N. Y.

52 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs-Respondents,

—against—

MICHAEL J. REGAN,

Defendant-Appellant.

Statement Under Rule 234

Defendant Michael J. Regan, appeals from a judgment of conviction rendered against him on April 9, 1953, convicting him of the crime of criminal contempt of court, and sentencing him to the New York City Penitentiary for the term of one (1) year.

Trial was had before Hon. Samuel S. Leibowitz, Judge of the County Court, Kings County and a jury on March 2, 4, 5, 1953.

An application for a Certificate of Reasonable Doubt was denied by Hon. M. Henry Martuscello, Justice of the Supreme Court of the State of New York, Kings County on May 13, 1953.

Julius A. Hellenbrand, Esq. represented the defendant at the trial.

Hon. Miles F. McDonald, Esq., District Attorney, Kings County represents the People.

4

Notice of Appeal

COUNTY COURT

OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

5 MICHAEL J. REGAN,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the defendant, Michael J. Regan, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from a judgment of conviction of the County Court of Kings County, rendered on the 9th day of April, 1953, convicting
6 said defendant of a crime of criminal contempt of court, and from each and every part thereof and from each and every intermediary order therein made.

Dated: New York
April 9, 1953

Notice of Appeal

Yours, etc.,

JULIUS A. HELLENBRAND
Attorney for Defendant
161-19 Jamaica Avenue
Jamaica 32, New York

To:

MILES F. McDONALD, ESQ.
District Attorney of Kings County
Municipal Bldg.
Brooklyn, N. Y.

CLERK OF THE COUNTY COURT
OF KINGS COUNTY
Brooklyn, N. Y.

10

Minutes of Presentment

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 6th day of February 1953

Present:

Hon. Samuel S. Leibowitz,
County Judge.

11

The People of the State of New York

—against—

Michael J. Regan

Indictment #249/1953

---

12 Proclamation made and Court opened.

The December 1949 Grand Jury comes into Court and presents an indictment against the following named defendant for the crimes set opposite his name.

X. Michael J. Regan—Indicted for Criminal Contempt of Court.
249/1953

A True Extract from the Minutes

Francis J. Sinnott
Clerk.

Minutes of Arraignment

13

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 9th day of February, 1953

Present:

HON. SAMUEL S. LEIBOWITZ,
County Judge.

14

THE PEOPLE OF THE STATE OF NEW YORK

—against—

MICHAEL J. REGAN

Indictment #249/1953

Proclamation made and Court opened.

15

The following named defendant personally appeared and was advised by the Court of his rights pursuant to Section 308, C. C. P. and was then arraigned to plead to indictment found against him for the crimes set opposite his name.

P.

22/436-B Michael J. Regan
249/1953
—Indictment for Criminal Contempt of Court.

16 *Minutes of Arraignment*

Pleads Not Guilty

Bail $2500.00—Paroled in custody of counsel until 3 P.M. of 2/9/53 to furnish undertaking.

Julius A. Hellenbrand, Esq., Retained.

A True Extract from the Minutes

Francis J. Sinnott
Clerk.

17

18

Indictment

COUNTY COURT

OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiffs

—against—

MICHAEL J. RECAN

Defendant

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of CRIMINAL CONTEMPT OF COURT committed as follows:

During the month of December, 1949, the Grand Jury, duly impanelled for said month in the County Court of Kings County, Part VI thereof, was engaged in a certain investigation and inquiry for the purpose, among other things, of investigating into the alleged activities of criminals, racketeers and gamblers within the County of Kings and every and all matters affecting and appertaining thereto; by various orders of this Court duly made and entered the said December, 1949, Grand Jury and the December, 1949, Part VI Term of said Court was successively and continually extended to the 30th day of June, 1953 to permit said Grand Jury to complete the investigation then and theretofore pending before that body.

22 *Indictment*

In furtherance of and within the scope of said investigation on, in and about the months of March, 1951, October, 1952, December, 1952 and January, 1953, said Grand Jury was conducting an inquiry to ascertain whether any plainclothes police officers of the City of New York, of whatever rank, who were charged with the specific duty of enforcing the laws against gambling and vice, had received bribes from bookmakers and gamblers within the County of Kings; whether
23 any of said police officers were protecting said bookmakers and gamblers within the County of Kings and for money or other consideration paid to said police were affording them immunity from detection, arrest and prosecution for violation of the laws against gambling and whether any of said police officers had financial assets or income which he could not account for, from legitimate sources.

In and prior to the month of March, 1951, Michael J. Regan, defendant herein, was a plainclothesman of the Police Department of the City of New York and during that period was assigned
24 to duty with a squad attached to the office of the Police Commissioner of the City of New York and did perform services in that capacity.

On the 7th day of March, 1951 defendant appeared as a witness before said Grand Jury in the County of Kings. Said defendant was thereupon duly sworn to tell the truth, the whole truth and nothing but the truth by a member of said Grand Jury duly authorized by law to administer an oath, the same being an occasion in which an oath is required by law and may lawfully be administered.

25

The examination of said defendant as a witness was thereafter adjourned and pursuant thereto defendant duly reappeared as a witness before said Grand Jury on the 22nd day of December, 1952 in the County of Kings.

On the said 22nd day of December, 1952, on said occasion, the following legal and proper interrogatory was put to said defendant as such witness:

> "Q. While you were a plainclothesman in the Police Department of the City of New 26
> York did you ever accept or receive any bribes from bookmakers or other gamblers?"

Defendant wilfully and unlawfully refused to answer said interrogatory and to testify.

Thereafter and on the 5th day of January, 1953, a judge duly presiding in the County Court of Kings County, upon application therefor duly made, directed said defendant to answer all legal and proper interrogatories propounded to him in the Grand Jury and to testify.

Thereafter and on said 5th day of January, 1953, the following interrogatory was put to said 27
defendant as such witness:

> "Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York did you receive any bribes from bookmakers?"

Said defendant further thereupon refused to answer said question and any further questions that would be put to him in said Grand Jury.

The interrogatories propounded to said defendant before said Grand Jury and herein set forth were legal and proper in that said Grand Jury

was investigating whether the defendant had received and accepted bribes in the County of Kings from bookmakers and gamblers to permit said gamblers and bookmakers to continue their gambling activities without police interference and to afford said bookmakers and gamblers police protection; whether this defendant was in possession of money, income or other assets which represented the proceeds of bribes given to him by gamblers and bookmakers in the County of Kings.

The refusal of said defendant, after having been duly sworn, to answer interrogatories, as in this indictment is set forth, was contumacious and unlawful and thereby the defendant committed a contempt of Court.

And so the Grand Jury aforesaid do say that the said defendant, MICHAEL J. REGAN, in the manner and form aforesaid did knowingly, wilfully and corruptly commit the crime of CRIMINAL CONTEMPT OF COURT against the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

MILES F. McDONALD
District Attorney, Kings County

Endorsements on Indictment

31

No. 249/1953 22/436-B

THE PEOPLE

vs.

P.
MICHAEL J. RECAN

32

INDICTMENT

CRIMINAL CONTEMPT OF COURT

A TRUE BILL

BENJAMIN R. NEMSER
Acting Foreman

MILES F. McDONALD
DISTRICT ATTORNEY

33

Pleads Not Guilty 2/9/53

Bail $2500. Paroled custody of counsel until 3 P.M. of 2/9/53 to furnish undertaking.

Judge Leibowitz

A. D. A. Koota

Filed Feb. 6, 1953

34 *Endorsements on Indictment*

(Plea)

2/9/53

Defendant personally appears and advised by the Court of his rights pursuant to Section 308, C.C.P. Have you a lawyer? Yes

Name of Lawyer Ret. Julius A. Hellenbrand

Pr. 161-19 Jamaica Ave.
Jamaica, L. I.

---

35 2/9/53

Oral application by counsel for defendant for Judge Leibowitz to disqualify himself and order the trial or disposition of this indictment before another part of this Court. Decision reserved.

Leibowitz, J. (1)

(Trial)

Tried—Part 1—3/2, 3/4, 3/5/53

36 Judge Leibowitz

A. D. A. Aaron Koota

Verdict Guilty as charged.

(Criminal Contempt of Court)

Defendant remanded

Leibowitz, J. (1)

Endorsements on Indictment 37

True Name Michael J. Regan

Male Color White

Age 38 Nativity N.Y.C., N.Y.

Residence 4 Marion Court
Hohokus, N.J.

Occupation Salesman

Mechanical Trade none

Married Yes

Read and Write Yes 38

Degree of Education 2 yr. H.S.

Religion Catholic

Degree of Religious Instruction Regular

Parents Living Mother living

Temperate

Drugs No

Previous Conviction none

Sentence N.Y. City Penitentiary, one (1) year 39

Judge Leibowitz (1)

Date 4/9/53

Julius Hellenbrand, Esq. present.

40

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 2nd day of March 1953

Present:

Hon. Samuel S. Leibowitz,
County Judge.

41

The People of the State of New York

—against—

Michael Regan

249/53

42 Indicted for Criminal Contempt.

The District Attorney of the County of Kings by Ass't Dist. Attorney Aaron Koota, moved this case for trial and it is so ordered.

Appearances:

Aaron Koota, Esq., Ass't Dist. Atty.

Robert Lazarus, Special Investigator for D.A.

Thomas Mackell, Attorney for Defendant

Minutes of Trial 43

Julius Hellenbrand, Attorney for Defendant
Sidney Strimpel, Official Reporter (Stenotypist)

John Lehritter and Emanuel Strahl, Clerks
The defendant is personally present with his counsel.

From the list of special trial jurors, received from the County Clerk of Kings County heretofore duly drawn to serve as jurors in this case; the following were duly drawn, empanelled, examined, accepted and sworn to try the issue in this case: 44

(Louis Lehman, now official reporter)

1. Irwin A. Horlbeck
2. Walter Thompson
3. Clifford A. Weibert
4. Michael Hoffman
5. Oskar Horowitz
6. Abraham D. Aizeniman
7. Abraham A. Levine
8. Carl Waxberg 45
9. Louis Plitt
10. David E. Keating
11. Ernest H. Froller
12. Hugh A. Casolaro

By direction of the Court the following alternate juror was duly called, empanelled, examined, selected and sworn to act as the alternate juror to try the issue in this case.

13. Arthur Nelowet

46 *Minutes of Trial*

The trial is adjourned to Wednesday, March 4th, 1953 at 10 o'clock A.M.

The jury is admonished. Defendant is continued on bail.

A True Extract From the Minutes

Francis J. Sinnott
Clerk

47

48

49

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 4th day of March 1953

Present:

Hon. Samuel S. Leibowitz,
County Judge.

50

The People of the State of New York

—against—

Michael Regan

249/53

Trial is continued from March 2nd, 1953. 51

All appearances previously noted are present. Defendant is present in Court. Sidney Strimpel, Official Reporter.

The thirteen jurors heretofore duly sworn to try this issue all appear and answer to the call of their names.

Motion made by Mr. Hellenbrand to dismiss the indictment. Motion denied.

Ass't Dist. Attorney Aaron Koota, Esq., opens to the jury.

52 *Minutes of Trial*

Atty Julius Hellenbrand, opens to the jury on behalf of the defendant.

PEOPLE'S WITNESSES

Julius W. Koch
Sworn 179-15 Anderson Road, Springfield Gardens, N.Y.

Raymon H. Chadeayne
Sworn 101 Lafayette Ave, Bklyn

53 Pincus Weinshenker
Sworn Clerk, County Court of Kings
120 Schermerhorn St. Kgs Co.

Recess for lunch. Defendant continued on bail. Jurors admonished.

After lunch. Trial resumed.

The defendant is personally present with his counsel, Messrs Hellenbrand and Mackell. The thirteen (13) jurors heretofore duly sworn, all appear and answer to the call of their names. All other appearances previously noted are present.
54

PEOPLE'S WITNESSES

Sidney Strimpel
Sworn 120 Schermerhorn St., (Official Kings County Reporter)

John J. Braff
Sworn 120 Schermerhorn St., (Official Acting Kgs Co. Reporter)

Ramon H. Chadeayne recalled.

Richard D. Alleyne
Sworn 219 McDonough St., Bklyn 33, N.Y.

People Rest.

Atty Julius Hellenbrand makes motion at end of People's Case Denied.

Jury of thirteen and the two (2) officers in attendance thereon are ordered confined in the Towers Hotel, the two officers being Martin Kaye and Julius Sohmer, who were first duly sworn; all ordered to receive lodging and refreshments not to exceed the customary charge for guests at said establishment and the same to be a county 56
charge. Bail continued. Jury admonished.

Recess to 10:00 A.M. on Thursday, Mar 5, 1953.

A True Extract From the Minutes

Francis J. Sinnott
Clerk

58

Minutes of Trial

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 5 day of March 1953

Present:

Hon. Samuel S. Leibowitz,
County Judge.

59

The People of the State of New York

—against—

Michael J. Regan

249/53

Indicted for criminal contempt. Trial continued
60 from Wednesday, March 4th, 1953.

Appearances:

Aaron Koota, Esq., Ass't Dist Atty

Robert Lazarus, Special Investigator for Dist. Atty.

Julius Hellenbrand, Esq., Atty for defendant
Thomas Mackell, Esq., Atty for defendant

Sidney Strimpel, Official Reporter

John Lehritter and Emanuel Strahl, Clerks

Minutes of Trial 61

The defendant is personally present with his counsel.

The thirteen (13) jurors heretofore duly sworn, all appear and answer to the call of their names.

DEFENDANT'S WITNESSES

Gerald V. Clarke
Sworn 385 Argyle Road, Bklyn

Defendant rests.

62

Defendant moves to dismiss on the entire case. Motion denied.

Atty Julius Hellenbrand sums up for the defendant.

Ass't Dist Aaron Koota sums up to the jury.

The Court charges the jury.

The jury retires in custody of Officers Deutsch and Gross, having been sworn.

Dinner order is signed for the thirteen jurors duly sworn in the case; the thirteenth juror to 63
be kept separate and apart from the other twelve since the charge by the Court; and the three officers in attendance thereon, not to exceed one dollar and fifty cents each and the same to be a county charge.

Recess to 2:15 P.M.

Defendant remanded. After recess. Trial resumed. The appearances previously noted are present.

64 *Minutes of Trial*

Defendant is personally present with his counsel.

The jury return into courtroom in custody of Officers Deutsch and Gross and say they find the defendant at the bar guilty as charged and so say they all.

Atty Julius Hellenbrand moves to set aside the verdict of the jury. Motion denied. A.D.A. Aaron Koota makes statement to Court. Defendant is remanded. Jury discharged.

65

A True Extract From the Minutes

Francis J. Sinnott
Clerk

66

67

Minutes of Sentence

At a term of the County Court, held in and for the County of Kings, at 120 Schermerhorn Street, in the Borough of Brooklyn, City of New York, on the 9th day of April 1953

Present:

Hon. Samuel S. Leibowitz,
County Judge.

68

The People of the State of New York

—against—

Michael J. Regan

Indictment #249/1953

Indicted for Criminal Contempt of Court, and convicted of the crime of Criminal Contempt of Court, by the verdict of a jury.

69

Being asked and he having nothing to say why the judgment of the law should not be pronounced against him, the Court pronounced Judgment as follows:

Whereupon, it is Ordered and Adjudged, by the Court, that the said Michael J. Regan for the misdemeanor aforesaid whereof he is convicted be imprisoned in the New York City Penitentiary for the term of one (1) year.

A True Extract From the Minutes

Francis J. Sinnott
Clerk

70

Preliminary Hearing

COUNTY COURT

KINGS COUNTY

PART I

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

71

MICHAEL J. REGAN,

Defendant.

Brooklyn, New York
December 22, 1952

Before:

HON. SAMUEL S. LEIBOWITZ,

County Judge.

72 Appearances:

AARON KOOTA, Esq.,
Assistant District Attorney,
for the People.

JULIUS HELLENBRAND, Esq.,
for the Defendant.

JOHN J. BRAFF
Court Stenographer

Mr. Koota: May it please the Court, at the request of the December 19, 1949 Grand Jury, this is an application to punish the witness who appears before you this morning, one Michael J. Regan, for contempt of court. As preliminary thereto, we ask your Honor to instruct the witness to appear before the Grand Jury to answer relevant and pertinent inquiries.

The Court: Is he here?

Mr. Koota: Yes, he is.

The Court: What question did you ask him? 74

Mr. Koota: The question was: Whether as a plainclothesman in the office of the Chief Inspector of the Police Department of the City of New York he had accepted graft from bookmakers or gamblers in the County of Kings. I can't say whether those are the exact words. The witness refused to answer.

The Court: Is that the question?

Mr. Koota: He read a statement to the Grand Jury in which he asserted his constitutional privilege against self-incrimination and claimed a waiver of immunity which he signed on a prior appearance before the Grand Jury and was in the first instance ineffective because he stated that he did not know what he was signing, and then in this statement he further stated that since signing the waiver of immunity he resigned from the Police Department of the City of New York. Mr. Regan is represented by Mr. Hellenbrand, an attorney, who is here before the Court now, and I think under a decision of the Court of Appeals, the decision taken by this witness is contumacious and without justification. He is either testifying under a waiver of immunity or he is not. If he is not testifying under a waiver of immunity, the 75

effect of the question arises only in the event that he is indicted for some crime, but he cannot refuse to answer any relevant and pertinent inquiries.

Mr. Hellenbrand: If your Honor please, I am advised by the District Attorney that the client will testify under the waiver of immunity which he has executed at a prior occasion. It occurs to us that this witness's status at the moment is in doubt. We have to be advised whether he is
77 operating under the waiver or is not. We claim that the District Attorney's office at the time my client executed the waiver of immunity did not advise him of his constitutional rights; nor did they explain the nature and the substance of the waiver of immunity. We claim that the waiver of immunity is a broad waiver of immunity which has relevancy to any crime or any transaction during the course of his employment as a police officer under the circumstances that was not effective and he was not properly shown the nature of the waiver of immunity nor his safeguards which he has under the law. Under the circum-
78 stances, it seems to me that the client should know if he testifies and if he tells the truth whether he will be incriminating himself by virtue of his testimony or whether he has immunity given him and everything he says before the Grand Jury, and if your Honor holds that the waiver of immunity was not effective and that Mr. Regan executed it without knowledge of all the safeguards as to what it means—

Mr. Koota: May I suggest, if your Honor please, in view of the claim in this instance, that this witness, a plainclothesman on the force, did not understand what the paper was that he signed,

I respectfully suggest to the Court that a preliminary hearing be held before your Honor so that we can determine as a question of fact whether the witness knew what he was signing at the time and signed it.

The Court: Well, I am merely asking this question as a question of law, not on the facts. Let us assume that the man signed a waiver of immunity; let us assume for the purpose of the argument that he did not know what he was signing, and that he is thereafter called before the 80
Grand Jury; let us assume for the purpose of argument that the waiver of immunity was not effectual, that is, effective; and that it has no consequence because the defendant did not know what he was signing; let us assume that for the purpose of our discussion. He is now brought before the Grand Jury and asked to testify about pertinent matters. The law gives him immunity, gives him immunity not only for the three crimes specified in the law, namely, bribery, gambling, and conspiracy, but for all allied offences that may have been committed. So therefore, if you 81
assume that the waiver of immunity is of no force and effect, the defendant is nevertheless given immunity in the manner that I have expressed, so he is not compelled to be a witness against himself within the meaning of the constitutional provision. That was decided by the highest court of the State in the People against Nick Castro.

Mr. Hellenbrand: The People against Nick Castro, if I recall it, and in the Gross case, as I read it is as follows: If a client is brought before the Grand Jury and he executed a waiver for gambling, conspiracy, and bribery, if any related

matters are elicited from his lips—that Mr. Regan operating under the waiver of immunity, he would not be indicted, as I understand it, assuming for the minute a crime other than gambling, he can be indicted because he is operating under the waiver of immunity.

The Court: What is your name?

Mr. Hellenbrand: Julius Hellenbrand. I am handling this on my own.

The Court: I ask you that for this reason. I
83 will show you what I said—

Mr. Koota: In the Breslin matter?

The Court: Yes. This man does not have to answer anything in the Grand Jury room, except those matters concerning his work as a police officer and as a member of the Vice Squad. Is that right?

Mr. Koota: That is right.

The Court: If any question is asked about which he is in doubt, it is a simple matter to say to the Grand Jury, "I have my lawyer outside. I will consult my counsel and get advice before I answer the question." That is simple English,
84 Mr. Regan?

Mr. Regan: Yes.

The Court: Concerning matters which involve his work as a plainclothesman he must answer this question because he will get immunity by virtue of the statute, and he is also protected in the light of the Castro decision.

Mr. Koota: It is our claim that he does receive immunity. He has waived it.

The Court: Whether he waived it or has not waived it, it is beside the point in the proceedings here this morning. If he has waived it and the

Court should later hold that he has waived it, that's that. The statute gives him immunity.

Mr. Koota: That's right.

The Court: So we do not have to determine now whether he has waived immunity or he has not. His contention is that he has not waived immunity. If counsel is correct then the statute gives him immunity, then he has no right to refuse to answer because he may incriminate himself. He can't incriminate himself, he is getting immunity by virtue of the statute.

86

Mr. Koota: For the first time in this investigation an issue has been raised as to the voluntariness of the waiver of immunity. This has never come up before. In the police decision in the Hofsaes case, it was decided that a witness is entitled to a clarification of his rights when he testified in the Grand Jury or whether he testified under a waiver of immunity, that immunity compelled him to await the possible exigency of the indictment. Since the witness is raising the effectual issue which was never urged before nor does he say that he was defrauded here—that this witness understood the nature of what he was doing, then your Honor's observation would be in order.

87

The Court: Suppose we put this matter down for two o'clock. I will give the matter further consideration. We will take the matter up again at two o'clock.

88 *Preliminary Hearing*

Brooklyn, New York,
January 5, 1953.

APPLICATION TO PUNISH FOR CONTEMPT

(HEARING CONTINUED)

Mr. Koota: This is a continuation of a proceeding had before your Honor on December 22, 1952, wherein the December, 1949 Grand Jury of the County of Kings seeks to punish a witness,
89 Michael J. Regan, for contempt of court because of his refusal to testify before the Grand Jury.

Upon the appearance before this Court on December 22nd in respect to the request to compel the witness to testify, the witness raised a question of fact, stating that he was not aware, at the time he signed the waiver of immunity, of what it meant and that he was not advised by anyone that he did not have to sign the waiver of immunity. I therefore ask your Honor to set it down now for preliminary hearing on the question of fact, and I will ask the Court's permission
90 to proceed.

The Court: Are you prepared to go ahead?

Mr. Koota: I am, your Honor.

I offer in evidence, if the Court pleases, waiver of immunity signed by Michael J. Regan, the witness herein.

The Court: Show it to counsel.

Mr. Koota: I have shown him all these papers, Judge.

The Court: Is there any objection?

Mr. Hellenbrand: No objection.

The Court: Mark it.

(Waiver of immunity received in evidence and marked People's Exhibit 1.)

Mr. Koota: I offer in evidence, if the Court pleases, page 67 of the minutes of the Grand Jury of March 7, 1951, which contains the testimony of Michael J. Regan.

(Page 67 above referred to received and considered marked People's Exhibit 2 in evidence.)

92 The Court: You may read it into the record, if there is no objection.

Mr. Hellenbrand: No objection.

Mr. Koota: Page 67 reads as follows:

"Michael J. Regan, residing at 3819 Harper Avenue, Bronx, New York, Shield #19508, having been called as a witness, testified as follows:

"*By Mr. Clarke*:

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that 93 your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

"(Waiver of immunity referred to re-

94 *Preliminary Hearing*

ceived in evidence and marked People's Exhibit 317 of this date.)"

People's Exhibit 317, if the Court please, is People's Exhibit 1 in this proceeding.

I now offer in evidence, if the Court pleases, the testimony of Michael J. Regan before the Grand Jury on December 22, 1952. It is very brief. May I read it into the record?

95 (Grand Jury testimony above referred to received in evidence and considered marked People's Exhibit 3.)

The Court: There is no objection?

Mr. Hellenbrand: No objection.

Mr. Koota: (Reading)

"MICHAEL J. REGAN, having been previously sworn, was recalled as a witness and testified as follows:

"*By Mr. Koota*:

96

"Q. Will you give your name? A. Michael J. Regan.

"Q. Your address? A. 4 Marian Court, Hohokus, New Jersey.

"Q. Have you previously testified before this Grand Jury? A. No.

"Q. Have you previously signed a waiver of immunity? A. Yes.

"Q. Were you formerly a plainclothesman? A. Yes.

"Q. While you were a plainclothesman in the Police Department of the City of New York, did

you ever accept or receive any bribes from bookmakers or other gamblers? A. I'd like to make a statement at this time.

"Q. You want to read it? A. Yes, sir.

"(Reading) Upon the advice of my counsel, I decline to testify on the ground—

"Q. Slower and louder so the Grand Jury can hear you. A. Yes. I'm sorry. You want me to start from the beginning?

"(Reading) Upon the advice of my counsel, I decline to testify on the ground that my testi- 98
mony might tend to incriminate me and subject me to other penalties. I claim my constitutional and statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body some time in March of 1951. I claim that I was not aware of the nature of this waiver of immunity; that at the time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same, nor at the time of the execution of this waiver was I explained my constitutional rights or the meaning of the waiver of immunity.

"I should like to add that since I signed the 99
waiver of immunity, I have resigned from the Police Department of the City of New York in March, 1951, after having served nine years, two months and several days. So far as I know, I have never been mentioned by anyone in connection with the present investigation, either at the criminal trial or the Police departmental trial.

"Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity, and inasmuch as I claim my constitutional rights were not properly safeguarded or explained to me, there is doubt and

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uncertainty concerning my status as a witness and my privileges and duties as such.

"Q. Mr. Regan, just one question I want to ask you. A. Yes, sir.

"Q. When this paper purporting to be a waiver of immunity was signed, were you then a member of the Police Department of the City of New York? A. I was.

"Mr. Koota: All right, Mr. Regan, would you step outside."

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Michael J. Regan again was recalled the same day, and having been previously sworn, was recalled as a witness and testified as follows:

"*By Mr. Koota*:

"Q. Mr. Regan, you said a moment ago that you did not testify before the Grand Jury. A. Yes.

"Q. But you were called before the Grand Jury? A. Yes.

102 "Q. Did you appear in this room? A. I did.

"Q. Was an oath administered to you? A. It was.

"Q. After the oath was administered to you, were you asked questions, such as your name and address? A. That's correct.

"Q. Were you then handed a financial questionnaire? A. That's correct.

"Q. Is that correct? A. That's right.

"Q. Were you then instructed to return that questionnaire filled out to this Grand Jury? A. I was.

"Q. When you said a moment ago you did not

testify before the Grand Jury, you meant other than what you have just stated, you did not give any testimony at length; is that correct? A. That's correct.

"Mr. Koota: All right, that is all."

Mr. Clarke.

GERALD V. CLARKE, 184 Joralemon Street, Brooklyn, New York, called as a witness for the People, being first duly sworn by the clerk, testified as 104 follows:

Direct Examination by Mr. Koota:

Q. Mr. Clarke, you are an Assistant District Attorney of the County of Kings? A. I am.

Q. In March, 1951, were you attached to the Special Investigation being conducted by the District Attorney of this County? A. I was.

Q. On that day did you appear before the December, 1949 Grand Jury? A. Idid.

Q. On that day did the respondent, Michael J. 105 Regan, appear before the Grand Jury? A. He did.

Q. Before he appeared before the Grand Jury, did he sign this paper called waiver of immunity, People's Exhibit 1 (handing to witness)? A. Yes, he did.

Q. Does your name appear on that waiver? A. It does.

Q. Is that your signature, "Gerald V. Clarke"? A. That's right.

Q. Now, the notary public is Richard J. Alleyne? A. That's right.

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Q. Was he a special investigator attached to the office of the District Attorney on March 7, 1951? A. He was.

Q. Is he in the courtroom today? A. He's right over there, sitting there (indicating).

Q. Will you tell the Court in your own words what, if anything, you said to Mr. Regan before he signed People's Exhibit 1 [illegible] evidence? A. Well, I showed him a piece of paper similar to this, which had the same form as this, which is
107 a waiver of immunity, and I stated to him, I said, "This is a waiver of immunity," I said, "which means in practical language, as long as you're not a lawyer, that anything that you testify in the Grand Jury or any statement you give could be used against you. On the basis of this information, if it spells out a crime, you could possibly be indicted for it." I said, "If you do not sign this waiver of immunity and if you are put into the Grand Jury then by the District Attorney, anything you testify could not be used against you." I said, "Under the Penal Law and under the City Charter, being that you are a
108 city employee the same as I am or the same as anybody else in the Department of Sanitation or Fire Department, you are requested, if the District Attorney sees fit, to sign such a waiver and to testify before the Grand Jury. Now," I said, "we are not forcing you to sign this waiver if you don't want to sign it. In your case we will report the fact to the Police Commissioner, and if we report the fact to the Police Commissioner that you refused to sign a waiver of immunity and testify before the Grand Jury, in

that case you will possibly lose your job, because under the City Charter you have to sign such a waiver and testify." I also told him that this testimony which he gives could be used during the life of the Grand Jury by the District Attorney or by the Grand Jurors themselves.

Q. After you stated that to Mr. Regan, did he sign People's Exhibit 1 in evidence? A. He did sign it, and before he signed it, I told him to read the waiver of immunity himself.

Q. Did he read it, so far as you know? A. He 110
read it in front of me.

Q. Now, at any time on that day when he signed that paper, did he tell you that he did not understand what that paper meant? A. No.

Q. Did he tell you that he wanted to have a lawyer before he signed that paper? A. No.

Mr. Koota: All right, you may cross examine.

Cross Examination by Mr. Hellenbrand:

Q. Mr. Clarke, did you tell Mr. Regan, before 111
he signed it, that he ought to get a counsel to look at the waiver of immunity? A. I did not.

Q. And did you tell him what his constitutional safeguards were if he didn't sign the waiver of immunity? A. I explained to him just what I explained to the court now.

Q. Well now, suppose you tell us what you told him was his constitutional safeguards.

Mr. Koota: I object to the form of that question as to constitutional safeguards. What he said is there, and it is a question or a matter of law.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Will you tell us, please, what you told him specifically with respect to what would happen to him if he did not sign the waiver? A. I said if he didn't sign the waiver, I would report that fact to the Police Commissioner.

Q. Did you have any conversation with him with respect to what would happen if he signed the waiver? A. If he signed the waiver, he would testify before the Grand Jury, and any testimony he gave could be used against him.

Q. And did you tell him what kind of testimony was required before the Grand Jury?

Mr. Koota: I object to that. There is no law which requires a witness to be told, in advance of his appearance, what he is going to be questioned about.

Mr. Hellenbrand: If your Honor please, the waiver of immunity says any transaction concerning anything that he had to do with the Police Department. Now, the whole basis of my contention here is that Mr. Clarke did not advise completely and fully with respect to the constitutional safeguards that the law throws around him if he does not sign the waiver of immunity. The mere fact that he would lose his job in the Police Department is unimportant, because he has no constitutional right to be a policeman, but beyond that, he has a constitutional right to be advised as to what

his privileges are before the Grand Jury, and I think the question is pertinent.

The Court: Objection sustained.

By Mr. Hellenbrand:

Q. Mr. Clarke, there was no stenographer present when you had this conversation with Mr. Regan; is that correct? A. That's true.

Q. And this conversation that you say that you had was in the outer, outside room of the Grand Jury; is that right? A. That's right. I have had 116 it with every policeman who ever testified.

Q. And about how many policemen were there that morning, do you recollect? A. No. It was a few, though.

Q. Would you say that there were about thirty policemen? A. I could not say how many.

Q. Well now, would you please look at People's Exhibit 1 and tell us how many policemen were present before the Grand Jury at the same time that Mr. Regan was present?

Mr. Koota: People's Exhibit 1 won't 117 show it. Suppose you go ahead. I will count them and tell you how many were there. You go ahead with your questioning and I will tell you how many were there.

Mr. Hellenbrand: Let us see it now.

Mr. Koota: The People will stipulate, if the Court pleases, there were thirty-five witnesses who appeared before the Grand Jury on March 7, 1951, which is the date that Michael J. Regan appeared.

By Mr. Hellenbrand:

Q. Now, at the time that Michael J. Regan signed this waiver of immunity, how many people were in the room? A. Quite a few people.

Q. Would you say— A. Maybe ten, fifteen, twenty.

Q. Would you say that there were about thirty-five people present? A. There might be thirty-five people present.

119 Q. And did you make this individual speech to each one of the policemen then present or did you make one speech to all of them? A. No. I would call them all in together, and then before he signed it, I would ask him to read this in front of me, but I made the speech to all standing right at the table in front of me.

Q. So that you made one speech to some thirty-five people: is that right? A. That's right.

Q. And told them what you thought the waiver of immunity meant; is that correct? A. And then before they signed it, I individually told them to read this waiver of immunity. They were all

120 standing within three feet of me, four feet of me.

Q. Did you tell them what this Grand Jury was concerned with, with respect to the testimony? A. I didn't.

Q. Now, I want to know what you told Mr. Regan would happen if he signed the waiver of immunity.

Mr. Koota: I object to that. It has been answered.

The Court: Let him answer it again.

A. If he signed the waiver of immunity?

Q. Yes. A. Anything that he testified to before the Grand Jury or any answers, questions to which were put to him by the Grand Jurors or the District Attorney, could be used by them as a basis of any possible crime during the life of the Grand Jury.

Q. Now, did you tell him at that time that if he did not sign the waiver and if he were called before the Grand Jury, that anything that he said before the Grand Jury at that time, he would receive immunity? A. I told him that if he didn't 122
sign the waiver and that the District Attorney placed him before the Grand Jury, then anything he testified to he would receive immunity, but that we would not put him in the Grand Jury, being that he was a city employee; he's under a duty, as we saw fit, that he should sign such a waiver.

Mr. Hellenbrand: All right, that is all.

Mr. Koota: I think at this point, if the Court pleases, we rest our case on this preliminary issue of fact.

The Court: You may proceed, counsel- 123
lor.

Mr. Hellenbrand: I am going to rest. I think that the testimony of the Grand Jury minutes shows that Mr. Regan was not advised as to his constitutional rights and privileges prior to signing, and I think that when they call him before the Grand Jury, they've got to show specifically that a conscientious effort is made to advise him exactly with respect to his rights and immunities before he signs a waiver of immunity.

If I may point out to your Honor, the Grand Jury minutes indicate that it asks him whether or not he understood it, but there is no proof, and I think that Mr. Clarke must go before the Grand Jury and put to him if he knows what his rights and privileges are if he does not sign it, and the categorical announcement that a speech was made to thirty-five people, one of which was my client, as to their rights in and of itself is not enough, particularly when my client does not have counsel present and was not advised to go out and get counsel before he signs the waiver of immunity.

The Court: Have you any proof to offer?

Mr. Hellenbrand: Not at this time, no.

The Court: Or at any other time on this question? Do you rest on the District Attorney's showing?

Mr. Hellenbrand: Yes. I rest at this time.

Mr. Koota: Now, if the Court pleases, I respectfully ask a ruling from the Court on the claim of this witness, Michael J. Regan, that at the time of the execution of the waiver of immunity he was not aware of the nature of the waiver of immunity.

The Court: There is nothing offered here in behalf of Mr. Regan. He has an opportunity to testify in his own behalf to sustain the allegation set forth in his petition by way of affidavit. This he has not seen fit to do. I must, therefore, decide the case on the testimony before me.

On the testimony before me, I rule that the defendant well knew what the signing

of a waiver of immunity was and what his rights were, and that he signed an effective and legal waiver of immunity within the purview of the statute and the decisions of our higher courts.

You have an exception.

Mr. Hellenbrand: Yes, I have an exception, but the whole purpose of this hearing, as I understand it—

Mr. Kocta: Let me make a statement.

The Court: It is stipulated, I take it, 128
that the defendant was a member of the Police Department?

Mr. Hellenbrand: The defendant was a member of the Police Department.

The Court: And for how many years?

Mr. Hellenbrand: Yes, by the time he was called before the Grand Jury, yes.

The Court: For how many years had he been a member of the Police Department?

Mr. Hellenbrand: Nine years.

The Court: And had been, in the performance of his duties, in and out of 129
courts?

Mr. Hellenbrand: Yes.

The Court: I take it that it is a matter of common knowledge that this investigation had received widespread publicity in the public press. Is that conceded? If not, I will take some proof on it. Is that conceded, counsellor?

Mr. Hellenbrand: I don't know. You are asking me. It was in the newspapers, yes, but other than that—

The Court: I say widespread?

Mr. Hellenbrand: If anybody had any interest in it.

The Court: However, I do not think I need to go into it any further.

Mr. Hellenbrand: No. The point I am seeking to make is that I have the proof, and I expect to bring a substantial number of people who were present that day, but I do not think that this is the forum for me to present it, because I intend to bring all the people down. I intend to have
131 my client testify as to what he was advised, but I am saying at this moment the prosecuting officials must show that they made an effort and that that effort appears in the minutes of the Grand Jury which indicates that my client was advised that the law gives him certain immunities if he testified, and that if he signs that paper, then he loses those immunities, and the fact that he is a policeman or the fact that he is an ordinary individual makes very little difference except that a Civil Service
132 job is involved, and that is not of moment on the question of whether or not the client understood the legal significance of the waiver.

Now, I want to make this point: This waiver that he executed, a copy of which I received this morning, says that he must testify to any transaction, to anything concerning anything that he had to do in connection with the Police Department and, as a matter of fact, I am not so sure that they can even require him to testify to things other, outside of what he did in the Police Department after he quit, because it is that broad.

Mr. Koota: Now, if the Court pleases, your Honor having overruled the first question of fact, the second contention urged by Mr. Regan for not testifying is that when he originally gave the waiver in March, 1951, he was a member of the Police Department; thereafter, he resigned from the Police Department. His contention now is that the waiver is no longer effective.

I ask your Honor to overrule that contention, on the authority of Matter of 134
Hofsaes, in the Court of Appeals.

The Court: The Court so holds. The Hofsaes settles that point clearly, that the waiver continues even though the defendant resigned from the Police Department.

Mr. Hellenbrand: Yes. I do not question the Hofsaes decision. I am just saying that the Hofsaes decision does not bring up for decision the matter that we have discussed this morning.

Mr. Koota: Now, I respectfully further ask the Court to instruct the witness, 135
Michael J. Regan, to return to the Grand Jury, to answer all legal and pertinent inquiries and to advise Mr. Regan that when he testifies, he is testifying under an effective waiver of immunity.

The Court: The Court so holds, and he is so instructed.

Mr. Koota: Thank you very much, your Honor. I think that concludes this proceeding.

The Court: Mr. Regan may return to the Grand Jury, if he be so advised, and testify, if he be so advised.

136 **Testimony**

COUNTY COURT

KINGS COUNTY

TRIAL TERM—PART I

PEOPLE OF THE STATE OF NEW YORK,

—against—

137 MICHAEL REGAN,

Defendant.

(Ind. No. 249/1953—Criminal Contempt)

Brooklyn, New York,
March 2, 1953.

Before:

HON. SAMUEL S. LEIBOWITZ,
County Judge, and a Special Jury.

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Appearances:

AARON E. KOOTA, Esq.,
Assistant District Attorney,
For the People.

JULIUS A. HELLENBRAND, Esq., and
THOMAS MACKELL, Esq.,
Attorneys for Defendant.

SIDNEY STRIMPEL, C.S.R.,
Official Reporter.

(The following occurred before the selection of the jury:)

(The following occurred at the bench:)

The Court: It is stipulated by and between the attorneys for the respective parties that if any prospective juror is a friend or relative of any member of the District Attorney's office or of an attache thereof, that he shall not serve upon this jury.

It is further stipulated that if any talesman is a relative or friend or an acquaintance of any police officer, either past or present, he shall be excused from service upon this jury; that in neither case shall either side by chargeable with a challenge, and the Court shall have the full right to exercise its discretion in excusing any talesman who may make application here to be excused. That is agreed upon, Mr. Mackell?

Mr. Mackell: Yes, your Honor.

The Court: That is agreed upon?

Mr. Koota: That is agreed, your Honor.

The Court: (To the talesmen) Gentlemen, I am about to make some general observations. In order to save time, I want to make some general observations about some fundamental principles of law that apply to every criminal case and to every defendant and to every prosecution.

Now, some of you may have served in a

criminal case as a juror heretofore, and others may not have served. Perhaps what I am about to say is familiar to those that have served, but I hope you will forgive me, because I am really trying not only to refresh your recollections, but to make known to some of those that have never had experience concerning these fundamental principles of law; perhaps I will save the time of the lawyers, the District Attorney, so that they will not ask you these 143 questions if they do not think it is advisable to ask them.

This defendant, Michael J. Regan—will you stand up, Regan, and face the room?

(The defendant rises.)

The Court: Is there anybody that knows Michael J. Regan? He is formerly a policeman of the City of New York. If there is anybody in this room who knows Mr. Regan, you are under a duty now to raise 144 your hand. If you do not raise your hand, we will all assume that you do not know this man. He is the defendant in the case.

(No response.)

The Court: All right; sit down, Mr. Regan.

Now, the attorneys representing Mr. Regan are Mr. Hellenbrand and Mr. Mackell. Will you lawyers please be good enough to stand up.

(Messrs. Hellenbrand and Mackell rise.)

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The Court: Does anybody here in the room know these two gentlemen?

(No response.)

The Court: Thank you.

Now, the District Attorney's office is represented here by Mr. Aaron Koota, Special Assistant District Attorney, and Mr. Lazarus. Does anybody know either of these two men? Raise your hand, if you do.

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(No response.)

The Court: Now, gentlemen, I take it now, by your silence, that you do not know the defendant, you do not know the lawyers for the defendant, and you do not know the lawyers for the prosecution.

This defendant has been indicted by the Grand Jury of Kings County, and by this indictment he stands accused of committing a criminal contempt of court. In a nutshell, the nature of the charge is that when he 147 was brought before the Grand Jury of Kings County, he refused to answer a question or questions put to him; I forget whether it is one or more; the indictment will specify it, and the charge is that he had no right to refuse under the law. The charge is that he was in duty bound, under the law, to answer, and that his refusal to answer constituted a contempt of court. That is the nature of the charge.

Gentlemen, the fundamental rules of law to which I refer are as follows: You have

heard what the indictment charges in substance. You all must know that an indictment is merely a charge or accusation; an indictment is not proof. The fact that the man is indicted is not the slightest proof that he is guilty. It is no evidence of any kind; it does not create even a suspicion of guilt. It is merely the means by which an accused is brought into court so that, through the processes of the law, his guilt
49 or innocence may be adduced. That is what it amounts to.

Is there any man in the room here who has any objection to that rule of law or who will find it difficult to enforce that rule?

(No response.)

The Court: Now, the second point that I desire to call to your attention is that this defendant, as is every defendant, is presumed to be innocent. The presumption of
50 innocence is an important right that belongs to the defendant. The fact that he is called the defendant, the fact that he has been indicted, does not place him in any position where any juror has a right to infer that he is guilty. Quite the contrary, he is presumed to be innocent, and the burden of the District Attorney is to prove him guilty beyond a reasonable doubt. There is no burden on him to prove anything. The burden is on the prosecution to prove him guilty beyond a reasonable doubt.

Is there any man in the room here who

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does not understand what I have said or who will fail to enforce these laws, which were enacted for the protection of an accused?

(No response.)

The Court: Is there any man who has any prejudice at all against this defendant for any reason at all; who could not give him a fair trial.

(No response.)

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The Court: Now, what a reasonable doubt is will be explained by the Court. You have to follow the explanation that I give you. The law comes from the Court. I will tell you what the law is, because under our system of criminal jurisprudence it is my duty to tell you what the law is, and you must accept the law as I give it to you. The Court is supreme upon all matters of law. The law comes from the Judge; it does not come from a fellow juror or from any other source. It comes from the Judge.

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The law says that you jurors are the sole and exclusive judges of the facts in this case. You are not here to please anybody. You are not here to please the defendant or the lawyers; you are not here to please the District Attorney; you are not here to please the Judge. You are here to please your own consciences, so that when you decide upon the guilt or innocence of the defendant, your verdict will be based upon the truth and on the law that is given to you by the Court. But you are the sole

154 *Colloquy*

and exclusive judges of the facts in the case.

The law also is that you have no right to consider the question of punishment in determining his guilt or innocence. You are not here to be harsh with him or be easy with him; you are not here to give him any breaks or to hold him up as an example to others. You are not here to use your power as a juror to change our system
155 of the social firmament. You are just here to determine whether he committed this crime or did not, that is all.

All right; now put twelve men in the box.

(Twelve prospective jurors were impaneled.)

The Court: Is there any objection, gentlemen, if I confer with Mr. Rosenthal, who wants to see me about some other matter, if we sit right here at the entrance to the courtroom? I will hear everything that is
156 being said. Is there any objection?

Mr. Hellenbrand: I have no objection.

Mr. Koota: No objection.

The Court: Because that is a requirement that the Judge be physically present. I shall be physically present, but at the threshold here.

Mr. Koota: Very well, your Honor.

(Twelve jurors were duly selected, examined, and sworn.)

(One alternate juror was selected and sworn by the clerk of the court.)

The Court: Will you gentlemen come up here, please.

(Conference at the bench.)

The Court: Gentlemen of the jury, I was very seriously considering locking you up during the progress of this case, which is nothing unusual. There will be two reasons why I would entertain the idea of locking you up, and that is, I would not want you to read about the case in the 158
newspapers or to listen to any news report over the radio, or some television commentator. And the other reason is that I would not want you to talk about the case with anybody or have anybody speak to you about the case, or discuss it in your house, or talk to some friend or have somebody else talk to you about the case; or have somebody call you up on the telephone and chat about it, innocently, I mean.

Now, if I had any misgivings that you would violate my instructions that I am 159
about to give you, I would lock you up as fast as that, and put you in a hotel, with comfort and proper convenience, of course, and keep you together during the trial. I am not fooling, either. But I am going to trust you men as men to follow the instructions that I am about to give you because I have all the confidence in the world that you will obey these instructions.

Sometimes a juror does not obey the instructions of the Court, and then that juror gets into serious trouble and serious diffi-

culty, and he causes a lot of trouble for others.

Now, these are the instructions. I give them to you most respectfully because it is my duty to give them to you, and I expect you to live up to them.

Under no circumstances are you to talk about this case, either among yourselves or to any other person. Is that simple English? Does anybody fail to understand
161 what I have just said? That means your wife at home. It means your cousin, your relatives, your next door neighbor, and anyone that wants to talk to you about it on the street, in the subway, in the elevator, or any place. If anybody tries to talk to you about this case, you come into this court on the day that we adjourn to, Wednesday morning, and you tell me that somebody tried to talk to you about this case. Leave the rest to me. So talk to nobody about the case. Do not let anybody else talk to you about the case, nobody. It
162 does not make any difference whether they are interested on the side of the prosecution or any other side. Do not let anybody say a word to you about this case.

Now, do not ask the good lady at home how she would decide the case if she were on the jury. Do not give her a little confidential information about the kind of case you are serving on. Do not tell her anything. Do not tell anybody anything. If you do not tell anybody anything, then you cannot get into trouble, and you cannot make any trouble for anybody. Is that

correct? When the case is over, I will give you freedom to talk about it to your heart's content, and then you cannot hurt anybody.

If you sit back in those seats and think about the matter soberly, you will find that the mind is like a sensitized film, the way you take a camera and take a pin and put a hole in the bellows in that camera, just a fine pinhole, and you allow the light to filter into that camera, that permits clandestine light to enter and you fog that film 164
and it is not the same any more. I do not want your minds to be fogged by any outside talk, or any outside remarks or suggestions. Your minds should be affected only by what you hear here in this courtroom from the witness chair and what may be properly called to your attention.

Now, somebody said here, I forgot whether it was the learned District Attorney or the learned counsel for the defendant, that you are the judges of the facts. You are the judges, indeed. And as good judges, you must reserve decision. That 165
means you have to keep your minds open as to whether he is guilty or innocent until you have heard both sides, and until you have heard the Judge's charge on the law.

Do not jump to any conclusion one way or the other. Keep your minds open. Reserve decision. If you reserve decision, you will make good judges, but if you jump at conclusions right away, you cannot be good judges.

I am going to trust you men. I will let you go home.

166 Is there any man in the jury box who does not understand what I have said? I think I have spoken simple English. I am doing all this so that justice may be done. The only interest I have in this case is to see that justice is done, that the truth prevails, that is all; whether it means his acquittal, or means his conviction. It does not make any difference to me, if justice is done. And that is the way I want you to feel about it.

167 All right, gentlemen, please believe me when I say that I have the utmost confidence in you, and I am saying these things to you on this point and in this fashion to bring home clearly to you men what I have said to you.

Now, unfortunately, the Assistant District Attorney, Mr. Koota, has to appear at the Court of Appeals tomorrow morning. He has to take the 9:00 o'clock train. This Court is an inferior court to the Court of Appeals. They take precedence over an

168 ordinary County Court Judge. Mr. Koota must be up there, and I have to let him go. I cannot force him to try the case tomorrow, because he has to appear in the Court of Appeals, which is in Albany, and he will be back here tomorrow night, and we can start the case promptly at 10:00 o'clock Wednesday morning.

So until then, gentlemen, good night, and I shall see you, God willing, Wednesday morning. You may retire [illegible] everybody remain in the room until the jury has retired.

(The jury retired from the courtroom.)

The Court: What about bail in this case?

Mr. Koota: No objection to bail being continued.

The Court: Bail is continued.

(Bail continued.)

(Whereupon an adjournment was taken to Wednesday, March 4, 1953, at 10:00 o'clock A.M.) 170

Brooklyn, New York,
March 4, 1953; 10:00 A.M.

TRIAL RESUMED

(The following occurred without the presence of the jury):

Mr. Hellenbrand: Now, if your Honor please, I move to dismiss the indictment on the ground that this defendant has been directed to answer questions under an ineffective waiver of immunity. 171

It appears from the preliminary hearing before your Honor on January 5, 1953, at which time defendant was directed to answer questions before the Grand Jury under the effective waiver of immunity that, (1) the District Attorney did not advise defendant that he did not have to sign such a waiver. (2) That it appears from the testimony of the District Attorney that

172 *Motion to Dismiss Indictment*

this defendant was not only requested but directed to sign such a waiver. (3) That the District Attorney did not advise defendant that he had a constitutional right to refuse to sign the waiver. (4) That from the testimony of the District Attorney, it appears that defendant was not properly made aware of the meaning of this waiver and the magnitude of this waiver. (5) That defendant was not afforded an opportunity
173 to obtain counsel, nor advised to obtain counsel. (5) That he was not advised as to general nature of the investigation so that client could not make an intelligent choice as to the signing of the waiver. (6) Defendant was afforded no opportunity to effectively test the claim that the waiver was ineffective and until the clarification and determination of defendant's rights as a witness, there could be and there was no criminal contempt by this defendant.

The Court: Motion is denied at this time.

174 Mr. Hellenbrand: Exception.

The Court: All right, bring the jury down.

Mr. Hellenbrand: May I have about ten minutes?

The Court: Do you want to do it now?

Mr. Hellenbrand: Yes.

The Court: Surely.

(Jurors returned; trial resumed.)

The Court: All right, you may proceed, Mr. Koota.

(Mr. Koota opened to the jury, in behalf of the People, as follows:)

Mr. Koota: May it please the Court, Mr. Foreman, and gentlemen of the jury:

I want to apologize for the necessity of my having been in the Court of Appeals yesterday on a matter of the office, and the necessity of bringing this case on today instead of going to trial yesterday. But on behalf of the People, I will be as ex- 176
peditious as I possibly can in presenting the People's witnesses to you.

It becomes my duty now to outline to you in a general way what this case is about, the nature of the charge, and the evidence that the People will adduce before you to substantiate this charge.

The defendant has been indicted charged with the crime of criminal contempt of court. I am not going to go into any law with you; that is a matter for his Honor, Judge Leibowitz, but in substance the law
says that where a person appears as a wit- 177
ness in any kind of a case and he refuses to answer a proper or relevant question and he has no just cause for refusing to answer that, then he commits a crime, criminal contempt of court. That is the law as declared by the Legislature of this State.

Now, the question, of course, must be a relevant question. If a man is called before a Grand Jury and he is asked, "Who won the World Series in 1913?" and the jury is hearing evidence about bribery or

corruption, naturally, that has nothing to do with it; he can refuse to answer such a question and it is not a crime. So I am going to prove to you that in this case this defendant refused to answer a proper question before the Grand Jury, and his Honor will charge you that refusing to answer a question before the Grand Jury, which is a part of the administrative processes of justice, is just like refusing to answer a
179 question before the Court; any witness who sits in that box and refuses to answer a question.

This defendant was formerly a police officer in the City of New York. He was on the force for approximately ten years, and his duties during a great part of this experience on the force or his stay on the force was as a plainclothesman. Let me tell you very briefly what a plainclothesman is. The Police Department has on its force detectives, it has men in uniform who patrol the streets, it has traffic cops,
180 and it has these plainclothesmen. They have one specific job, a special job, and that is to lock up the bookmakers, the gamblers, the prostitutes—anything that has to do with vice. And they are called vice cops, vice squads, and they are called plainclothesmen because, when they work, they wear ordinary civilian clothes just like you and I are wearing now. You cannot arrest a gambler if you are going to walk up to a bookmaker on the street and you are wearing a uniform; that is not

going to produce any results. So they work in civilian clothes, and that is why they are called plainclothesmen.

Now, the Police Department, throughout the City of New York, is divided into divisions.

Mr. Hellenbrand: If your Honor please, I think now we are going far afield as to dividing into divisions and the like. That is not pertinent to this issue.

The Court: Objection overruled. 182

Mr. Hellenbrand: Exception.

Mr. Koota: At the head of each division is an inspector of police. Now, these divisions, there is nothing mysterious about it. There are a number of precincts. You have four or five police precincts constitute a division. There are about twenty divisions throughout the whole City of New York. And at the head of each division is an inspector. Each inspector has attached to him a plainclothes squad consisting of ten or twelve men, and it is the duty of that plainclothes squad to suppress gambling 183 and vice in that particular division.

Now, in addition to that, the Chief Inspector of the City of New York, who is next in rank to the Police Commissioner, he has his own confidential squad of plainclothesmen. And over the Chief Inspector's squad of plainclothesmen you have the Police Commissioner, who has his own squad of plainclothesmen. And we will show you that this defendant was assigned to the Police Commissioner's squad of plainclothesmen, so that he could go over

184 *Opening for People*

the whole City of New York. Unlike a plainclothesman who is assigned to an Inspector in a particular Division, where he is confined to a particular territory, the Police Commissioner's squad, which was over all the other squads in the City of New York, this defendant was on the Police Commissioner's squad as a plainclothesman, and his job was to see to it that gambling stopped, and his job was to lock
185 up a bookmaker when he saw him making book. Now, so much for this defendant and what his position was.

In January of 1950, December of 1949, the Grand Jury of this County—and there is nothing mysterious about a Grand Jury. It consists of twenty-three men and women who are taken from their regular walks of life, just like you are. That Grand Jury began an investigation to try to find out why gambling and bookmaking in Brooklyn was as rampant, and flourished as wide as it did. It was open, it was widespread,
186 and they wanted to know whether the cops were getting bribes, whether the cops were being paid off to give these fellows protection. That Grand Jury has been doing that work, the evidence will show, continuous since December, 1949. For these last three years it has been trying to find out about these vice cops, and whether they were getting bribes, and all about that.

Now, in September of 1950, the District Attorney's office arrested a bookmaker named Harry Gross.

Mr. Hellenbrand: Now, I object to that.

The Court: Overruled.

Mr. Hellenbrand: Exception, if your Honor please.

Mr. Koota: After that, the Grand Jury began to call in as witnesses the plainclothesmen, all the plainclothesmen; whoever worked in Brooklyn or who worked in the Police Commissioner's confidential squad or worked in the Chief Inspector's confidential squad, which had jurisdiction 188
over Brooklyn as well as the other Boroughs, to try to find out from these plainclothesmen whether they are taking graft from Gross or any other bookmaker.

Now, how did they do that? It would be childish to call a plainclothesman into the Grand Jury, and say to him, "Mister, did you take any graft from Gross, the bookmaker?" Of course, he's going to say, "I didn't." So the Grand Jury began to give out what we call financial questionnaires to all of these plainclothesmen, and I think 189
in the course of the trial you may see one of these financial questionnaires. It was a questionnaire consisting of about sixty or sixty-five questions, which asked all about the income that these plainclothesmen had while they were plainclothesmen, and all about their assets; how much money they had, and what they were worth. We will show you that these plainclothesmen were getting about $4,000 a year as a salary, and the object which the Grand Jury had in mind was this: and it is perfectly evident to all of you businessmen

that if a plainclothesmen answered a financial questionnaire when he was earning $4,000 a year, and he said "I got a mansion out in Westchester and I got a yacht and I got $50,000 cash lying around," or if he says, "On $4,000 a year I support a family and I send my children"—

Mr. Hellenbrand: If your Honor please, I think this is highly prejudicial. It is not germane to the—

191 The Court: Objection overruled.

Mr. Hellenbrand: Note my exception, and I ask for the withdrawal of a juror as prejudicial.

The Court: Motion denied.

Mr. Koota: Or if this plainclothesman says, "I send my children to private school," if such a thing happens, "and I run a couple of automobiles," things like that, and that scale of living is not justified by the $4,000 a year he gets, then the Grand Jury will say to this man, "Where did you get this money?" Because

192 the Grand Jury is trying to find out whether this money is the graft that he got from bookmakers.

So, on March 7, 1951, Regan, this defendant, together with maybe three or four hundred other officers—they were not called all on that day. These plainclothesmen were called over a period of time. But on March 7, 1951, this defendant is called before the Grand Jury, and he signs what is known as a waiver of immunity.

Without going into any legal discussion about what that is, it simply means this:

That ordinarily a witness appears in the Grand Jury and he testifies, and if he says, "I committed a crime," or something like that, he cannot be prosecuted for it. But if he signs a waiver of immunity, it means that he can be prosecuted in the event his testimony shows that he committed a crime. For example, if a plainclothesman, who has to tell the truth when he is in the Grand Jury, tells that "I took a bribe from a gambler"; now, if he does not sign any 194
waiver, he cannot be prosecuted for taking that bribe. But if he signs a waiver, then he can still be prosecuted for it.

Now, the law, as his Honor will charge you ,is this: That where police officers are concerned or any City official is concerned, if he is called before a Grand Jury, he must sign a waiver of immunity or he loses his job immediately. The law says that where a city employee goes before a Grand Jury and a court and says, "I refuse to answer because it might incriminate me," he loses his job immediately, or, if 195
he refuses to sign such a waiver of immunity, he loses his job at once.

This defendant appeared before the Grand Jury on March 7, 1951. He was then a plainclothesman in the Police Department, and he signed this waiver of immunity, and he was given a financial questionnaire. This was March 7, 1951. He was requested to return—this is a blank form of questionnaire, with all kinds of questions which have to be filled in, the answers to it have to be filled in. He is

196 requested to return this questionnaire to the Grand Jury all filled out on March 28, 1951. On March 27, 1951, this defendant resigned from the Police Department, the day before he was supposed to return this questionnaire, and never returned this questionnaire.

Mr. Hellenbrand: Now, that I object to as highly prejudicial, the fact that he never returned his questionnaire and I move for
197 a mistrial as not germane to the issue.

The Court: Motion denied.

Mr. Hellenbrand: Exception.

Mr. Koota: Now, from March, 1951, to October, 1952, almost eighteen months, this defendant did not appear before the Grand Jury. At this time I will not tell you why; it may not be admissible in evidence as to why he did not appear. That matter may come up in the course of the trial. But suffice it to say for the present that we subpoenaed him again in October of 1952,
198 the District Attorney's office did. They brought him in on October 22, 1952 before the Grand Jury, and he was given another questionnaire. Eighteen months had elapsed. He did not have his old questionnaire. And he was told to bring it back on November 12th, and he said, "All right."

Now, November 12, 1952, he comes back and he asks for more time. He says, "I didn't have enough time to fill out these questions. Give me more time," and in the Grand Jury we said all right. So he is given until December 22nd to bring back

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his questionnaire. At that time he is no longer on the police force. That does not stop the Grand Jury from doing its duty and trying to find out whether, while he was on the police force graft was being paid to him. He comes back on December 22nd before the Grand Jury. His questionnaire is not filled out, and he is asked a specific question, "Mr. Regan, did you ever take bribes from a bookmaker while you were a plainclothesman?" There was no pussyfooting around or shillyshallying. We asked him squarely, "Did you ever take bribes?" So he said, "I won't answer that question because it might incriminate me," and he read a statement to the Grand Jury which you will hear as this case proceeds. He said, "I don't know how I stand before this jury. I don't know whether when I testify here, I can be prosecuted for what I say, or whether I'm given immunity because I don't know whether that waiver that I originally signed in 1951 is still effective. I want advice as to what my rights are, how I'm testifying." The Grand Jury was not pressuring him into anything at that time or any other time. They were giving him all the time in the world to assert his rights.

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And, so, on December 22nd, he was brought into this courtroom before Judge Leibowitz, and he was then represented by his attorney, Mr. Hellenbrand, and I appeared for the District Attorney then, and Mr. Hellenbrand stated to Judge Leibowitz, he said, "Here, I don't know what my

202 rights are. I want you to advise me as to what my rights are, whether I'm testifying under a waiver or not. I also want to tell you, Judge Leibowitz," he says, "that at the time I signed the waiver, I didn't know what I was signing; no one explained it to me." This police officer has been a plainclothesman on the police force for ten years. Those are not the exact words he used before Judge Leibowitz, but his exact
203 words will be brought to your attention in the course of the trial.

The matter was then adjourned to January 5th to have a hearing before Judge Leibowitz so that the Judge could determine these issues. On January 5, 1953, the matter was brought on again for a hearing before Judge Leibowitz, and Judge Leibowitz, after hearing the case, said "I find that you knew what you were doing when you signed this waiver of immunity and that it is still an effective waiver of im-
204 munity. Now, I have cleared up any doubt you have in your mind as to what your status is. Now, you know when you testify, anything you say can be used against you because you signed that waiver of immunity. Now, I direct you to go back to the Grand Jury and answer the questions." His rights had been declared by the Judge at that time. He knew what his rights were. He is taken back to the Grand Jury that morning, on January 5, 1953, and again he was asked the question: "While you were a plainclothesman, did you accept

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graft or bribes from bookmakers?" And despite the ruling of Judge Leibowitz, he said, "I refuse to answer the question whether I ever took a bribe from a bookmaker." Now, that question, you can clearly say, is a proper question, and it is relevant to what this Grand Jury was investigating. That was the very heart and soul of the investigation, to find out whether cops, plainclothesmen were taking graft 206
from gamblers, and we asked him that very question. We did not ask him to tell us how old his Aunt Tillie was, or anything like that. We asked him a square question, which was the very thing this Grand Jury has been trying to find out for these last three years, and he refused to answer. And it is the contention of the People that this defendant had a motive for refusing to answer; that he knew if he had answered that question—

The Court: I would not go into that, if 207
I were you, at this time.

Mr. Koota: Very well, sir.

We contend that this question was a relevant question, it was a proper question; that this defendant had no just cause for refusing to answer, and when I speak of just cause, gentlemen, he may have a reason in his own mind why he refuses to answer, but that is not just cause. It is only what the law says is just cause that a man can refuse to answer as an excuse, not because a man may say to himself "I don't feel like answering that question. I think I got a good reason." That is not enough.

Otherwise, nobody would answer questions. He had no just cause within the meaning of the law to refuse to answer the question, and he committed a criminal contempt of court.

I shall ask you, at the conclusion of this case, to find a verdict of guilty as charged in the indictment.

Thank you.

The Court: (To Mr. Hellenbrand) You may open.

(Mr. Hellenbrand opened to the jury, in behalf of the defendant, as follows:)

Mr. Hellenbrand: May it please your Honor, Mr. Foreman, gentlemen of the jury: The defendant denies that he committed a crime of criminal contempt of court as charged in the specific indictment that is before the Court and this jury.

It will be proven that this is not a case involving the failure to file a questionnaire or revealing any sources of income. We are confined, and the proof will disclose that the sole issue is whether or not Mr. Regan, the defendant in this case, had a legal and a just legal reason to refuse to answer the question that was put to him by Mr. Koota on December 22nd of 1952 and on January 5, 1953.

Now, the proof will disclose that Mr. Regan was in the plainclothes squad up until 1947. After 1947, until 1951, he was a patrolman out on the beat, wearing a uniform. He had severed his connections

with the plainclothes squad in 1947. Now, in March of 1951, the proof will disclose that this defendant, with other officers, was called before the District Attorney—I'm sorry—called before the Grand Jury in this very building. And the proof will be disclosed that at that time there was a crowd of other officers, the exact number of which will be proven here from the witness box. And the proof will disclose, too, that when Mr. Regan, the defendant, 212
was called before the Grand Jury in March of 1951, that the District Attorney could have done one of several things: They could have said to Mr. Regan, "Mr. Regan, you testified before the Grand Jury," and the proof will be disclosed, it will be conceded that if Mr. Regan testified before the Grand Jury and any information that was disclosed from his lips as a result of being before the Grand Jury, which information spelled out that a crime had been committed, that Regan would be free 213
as a bird, that he could not go to jail for that particular crime, or the District Attorney could say, as they did in this case, "We request that you sign a waiver of immunity," and the proof will disclose that the waiver of immunity is a broad document wherein, prior to testifying before the Grand Jury, prior to a prosecution, the particular witness agrees in advance, not with the District Attorney, but signs a paper—and this will be proven—that he waives his basic rights, and gives away his basic constitutional rights which the

law throws around people so that they have a right not to be a witness against himself, not to be convicted out of their own mouth.

We will show you the circumstances under which this piece of paper was signed, and we contend, and the defendant contends that this particular waiver, this particular paper that he signed was signed under such circumstances as to make it unenforceable, ineffective, no good.

Now, those were the facts up until December of 1952, a year and a half later, December of 1952, when Regan appeared before the Grand Jury, and I was then present with him as his lawyer. Mr. Regan was called before the Grand Jury, and Mr. Koota, on behalf of the District Attorney's office, asked him a direct and solid question: "Mr. Regan, did you take graft from bookmakers and gambling people?" And Mr. Regan read a statement, and we will have the statement, wherein he said "Before I answer that question, I want to know what my status is and what are my rights. Do I testify under the waiver so that if I answer this question and I say that I took graft and bookmaking, that therefore I committed a crime and you will indict me, or am I like any other individual, can I go before the Grand Jury and if I answer to the affirmative on that question, do I have the immunities that I would have had had I not signed that paper under the circumstances under which

I signed it?" Those were pointed questions, those were questions that Mr. Regan, as a witness, had a right, a basic right to ask.

The proof will disclose that thereafter, on December 22nd of 1952 and January 5, 1953, there was a preliminary hearing, and as a result of that preliminary hearing, Mr. Regan was directed to answer questions under an effective waiver of immunity.

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We contend, and the defendant contends in this case that effective waiver of immunity was not effective, was not valid and was not legal, and we say that we did not commit the crime of criminal contempt of court, because we refused to answer questions under an ineffective waiver of immunity.

Now, Judge Leibowitz the other day stated an excellent analogy as to a camera and a picture. We are starting the case now, and the whole purpose of our asking you questions before you became jurymen was to keep an open mind and weigh and determine the issues until the last man has said his last word. The indictment is only for the crime that he—an alleged crime that he refused to answer a proper and legal question and that he was contumacious before the Grand Jury. We are not involved as to other plainclothesmen. This is not a charge involving taking graft. The question is: Did my client, Mr. Regan, the defendant in this case, have a proper legal reason to refuse to answer questions under an effective waiver of immunity?

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220 And we will prove that this waiver of immunity was not effective, was not legal and was not valid.

After we have submitted all this proof to you, we will expect the jury to come in with a verdict of not guilty in this case.

The Court: Call the first witness, please.

Mr. Koota: Mr. Koch, please.

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221 JULIUS W. KOCH, residing at 179-51 Anderson Road, Springfield Gardens, Long Island, New York, called as a witness for the People, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Koota:

Q. Mr. Koch, you are a civilian employee of the Police Department of the City of New York, are you not? A. I am.

Q. How long have you been so employed? A.
222 Thirty-five years.

Q. Are you connected with the office of the Clerk of the Police Department? A. I am.

Q. Does the office of the Clerk of the Police Department contain records with respect to the assignments of all the policemen in the City of New York? A. Yes, sir.

Q. Are those called force cards? A. Yes, sir.

Q. Was there a policeman in the Police Department of the City of New York by the name of Michael J. Regan, Shield #19508? A. Yes, sir.

Q. Have you produced his force card? A. I have, sir.

Q. May I have it, please? A. Handed to Mr. Koota.)

The Court: Is it conceded that that is the force card of this defendant? Let us save a little time.

Mr. Hellenbrand: All right, we so concede.

Mr. Koota: I offer it in evidence, if the Court pleases.

The Court: Mark it in evidence. 224

(Marked People's Exhibit 1 in evidence.)

The Court (To Mr. Koota): You may read whatever pertinent matter is proper from the force card. The other side may read whatever matter it desires.

Mr. Koota: Very well.

This is the force card of the defendant, Michael J. Regan, gentlemen.

The Court: In other words, that is the man's employment record. This will tell 225 you what jobs he held in the Police Department and will give you the dates when he held the jobs. Is that clear, gentlemen?

All right; go ahead.

Mr. Koota: He was appointed in August of 1942 to the Police force and he was on patrol up until November, 1942. In January of 1943 he was assigned as a plainclothesman to Headquarters Squad in Brooklyn. This went on until April of 1943. From April, 1943 to March, 1944, he was a patrolman. In August, 1944, he

was again assigned to duty as a plainclothesman, and in October of 1944 he was assigned to duty as a plainclothesman to the Police Commissioner's office. From October, 1944 to April, 1946 he was a plainclothesman in the Police Commissioner's office. In April, 1946 he was restored to uniform duty as a patrolman, and in January, 1947 he was again assigned to duty as a plainclothesman in the Police Commissioner's office. That lasted to May,
227 1947, and on May 1, 1947 he was transferred from the Police Commissioner's plainclothes squad to the Division plainclothes squad in Brooklyn, and he was there from May, 1947 as a plainclothesman until June, 1947, as a plainclothesman.

The Court (To the witness): Is the 20th Division in Brooklyn?

The Witness: No, sir, that is Queens.

Mr. Mackell: Brooklyn.

The Court: Let us settle it. Was it Brooklyn or Queens?

228 Mr. Koota: Brooklyn.

Mr. Mackell: Brooklyn, your Honor.

The Court: All right. It is stipulated that the 20th Division was in Brooklyn. It constitutes, as I take it, several station houses in one inspection district?

The Witness: Yes, sir.

Mr. Koota: From May, 1947 until October, 1948 he was in plainclothes at the 20th Division. He resigned from the Police Department on October 31, 1947, but then was re-admitted on October 30, 1948.

Mr. Hellenbrand: Mr. Koota, you said

May he was in the plainclothes squad and you just read now that he quit for a year. Will you correct that?

Mr. Koota: Yes. From October, 1947 to October, 1948 he was out of the Department altogether; he had resigned. He was restored in October of 1948 to the Police Department, and on March 27, 1951 he was dropped from the rolls.

By Mr. Koota: 230

Q. Now, according to People's Exhibit 1, Mr. Koch, on March 27, 1951, there is a notation "Dropped from the rolls, R.W.O.P." Will you tell us what those initials mean?

The Court: Wait a moment. Did you hear the question?

Mr. Hellenbrand: No, I did not. I'm sorry.

The Court: Read it.

(Last question read as follows: "Q. 231 Now, according to People's Exhibit 1, Mr. Koch, on March 27, 1951, there is a notation 'Dropped from the rolls, R.W.O.P.' Will you tell us what those initials mean?")

Mr. Hellenbrand: That is objected to, if your Honor please.

The Court: What is the date?

Mr. Koota: March 27, 1951.

The Court: Sustained.

By Mr. Koota:

Q. Now, Mr. Koch, will you tell the Court and jury what a plainclothesman is? A. A plainclothesman is a uniformed patrolman assigned to duty in plain—civilian clothes, and he has the duties of performing—to detect and arrest offenders of the gambling laws, the public morals and various statutes of the ABC laws.

Q. Now, these plainclothesmen work in civilian clothes, do they not? A. Most of the time, yes, sir.

Q. In October, 1944, was there a plainclothes squad attached to the Police Commissioner's office? A. Yes, sir.

Q. Did that plainclothes squad have jurisdiction over the entire City of New York? A. Yes, sir.

Q. Is there in addition a plainclothes squad attached to each Division in the City of New York? A. Yes, sir.

Q. Normally, a division is headed by an Inspector of police or a Deputy Inspector; is that correct? A. Yes, sir.

Q. And each Inspector or Deputy Inspector has his own plainclothes squad in the Division? A. Yes, sir.

Q. And is it a fact that the jurisdiction of the Division plainclothes squad is confined to the physical territory of that Division? A. Yes, sir.

Q. Now, did you at my request examine the records to determine the maximum salary paid to Michael J. Regan as a plainclothesman?

Mr. Hellenbrand: That is objected to, if your Honor pleases.

The Court: Overruled.
Mr. Hellenbrand: Exception.

A. Yes, sir.

By Mr. Koota:

Q. What was the maximum salary that Mr. Regan at any time received? A. You mean year by year?

Q. No. Can you give us first the largest amount that he ever received? A. Well, I did this in a 236
hurry. I think it is approximately—

Q. Well, tell us what you have there. I will withdraw the question. Will you tell us what your records show as to the saiaries earned by this defendant? A. Well, he was appointed in the latter part of '42 and he had earned about an average of $830.

Q. What was the maximum salary he got? Let us come down to that. A. I figure in the neighborhood of $24,000.

Q. What is the most he ever got per year? A. The largest per year was $4150. 237

Q. And off that, of course, would come all the income tax and the other deductions? A. Yes.

By Mr. Koota:

Q. When you say the largest he earned was $4150, you mean that was for the year? A. Yes, sir.

Q. That was his gross salary? A. Yes, sir.

Q. That was the largest salary he ever earned for any year while the defendant was on the Police force? A. Yes, sir.

Mr. Koota: Your witness.

238 *Julius W. Koch—for People—Cross*

The Court: Do you want to cross examine?

Cross Examination by Mr. Hellenbrand:

Q. Mr. Koch, in addition to the salary that you just mentioned, there was a bonus, was there not, by the City of New York to these policemen? A. The amount includes the bonus.

Q. The amount includes the bonus? A. Yes, sir.

239 Q. All right. Now, I think you testified that the record, People's Exhibit 1, indicated that Mr. Regan left the Department for one year; is that correct? A. At a certain period, yes, sir.

Q. And that was from May 1, 1947, is that correct, to May 2, 1948? A. I can't tell you.

The Court: Is that important?

Mr. Hellenbrand: I want to show that he was out of the Police Department.

The Court: He has already testified that he was out a year.

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By Mr. Hellenbrand:

Q. Now, in accordance with the practice and the procedure of the Police Department, in order to be reinstated, the policeman would have to have a good record; isn't that true?

Mr. Koota: I object to that, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: Exception.

All right, no other questions.

Mr. Koota: That's all.
Mr. Weinshenker.

PINCUS WEINSCHENKER, 120 Schermerhorn Street, Brooklyn, New York, called as a witness for the People, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

The Court: Now, gentlemen, will you come up here to the bench? Maybe we can save a lot of time. 242

(Conference at the bench:)

Direct Examination by Mr. Koota:

Q. Mr. Weinschenker, you are a clerk of the County Court of Kings County? A. Yes, sir.

Q. Have you produced the records with you showing the organization of the Grand Jury of the County of Kings for December, 1949? A. I have. 243

Q. That Grand Jury was originally impaneled for the month of December, 1949? A. That's right.

Q. Was the Foreman of that Grand Jury one Raymon H. Chadeayne? A. That's correct.

Q. Had that Grand Jury been continued since December, 1949, to date? A. Yes, sir.

Q. Has it been continuously in session pursuant to the orders of the County Court during that interim? A. That's correct.

Q. In March of 1951 was that Grand Jury in session properly?

The Court: It is stipulated, I understand, by and between the attorneys, according to the conversation here at the bench, that the Grand Jury was duly organized, that it was duly in session at all times from December, 1949 to date, and that all of its actions were pursuant to law, functioning as a Grand Jury, and that there is no question being raised here or any technicality being raised here about
245 the power of the Grand Jury to function as a Grand Jury—

Mr. Hellenbrand: Right.

The Court: Pursuant to the order of the Court as filed with the Clerk of the court.

Mr. Koota: That is so conceded, Mr. Hellenbrand?

Mr. Hellenbrand: Yes, that is so conceded.

Mr. Koota: Now, solely for the purpose of the record, may I have one of the orders, Mr. Weinschenker?

246 (Handed to Mr. Koota.)

Mr. Koota: This Grand Jury was extended for the purpose of investigating the alleged activities of criminals, racketeers and gamblers within the County of Kings, and every and all matters affecting and appertaining thereto?

Mr. Hellenbrand: I so stipulate, that the order so provides.

Mr. Koota: If the Court pleases, I do not know whether this is essential, but the contempt charged here is refusing to testify before a Grand Jury. Perhaps the jury is

entitled to some evidence as to what a Grand Jury is. I thought the jury might be entitled to some evidence as to what a Grand Jury is, unless the Court will give it to them.

The Court: I will tell them what a Grand Jury is. That is a question of law.

Mr. Koota: That is all, Mr. Weinschenker. Very well, sir.

Mr. Hellenbrand: No questions.

Mr. Koota: Mr. Chadeayne. 248

RAYMON H. CHADEAYNE, residing at 101 Lafayette Avenue, Brooklyn, New York, called as a witness for the People, being first duly sworn by the Clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Koota:

Q. Mr. Chadeayne, are you the Foreman of the December, 1949 holdover Rackets Grand Jury? A. Yes, sir. 249

Q. Were you such Foreman since its inception, December, 1949? A. Yes, sir.

Q. Have you continuously since then, and today, are you the Foreman? A. Yes, sir.

Q. As the Foreman of the Grand Jury, do you administer the oaths to witnesses when they appear before the Grand Jury? A. Yes, sir.

Q. Do you know this defendant Michael J. Regan? A. Yes, sir.

Q. On March 7, 1951, did the defendant, Michael J. Regan, appear as a witness before the 1949 Grand Jury? A. He did.

250 Q. Did you administer an oath to him as such witness? A. Yes, sir.

Q. Prior to the administration of the oath, did the defendant sign a waiver of immunity? A. He did.

Q. I show you this paper and ask you if this is the waiver of immunity signed by the defendant on March 7, 1951 (handing to witness)? A. It bears the signature of Michael J. Regan. It is dated March 7, 1951.

251 Mr. Koota: I offer it in evidence.

Mr. Hellenbrand: If your Honor please, I object to that. There is no proof that he saw him sign the waiver of immunity.

Mr. Koota: Prima facie, if the Court please.

The Court: Wait just a moment.

By the Court:

Q. Did he sign the waiver in your presence? A. No.

252 Q. In whose presence does it indicate the waiver was signed?

Mr. Koota: In the presence of Richard Alleyne, notary public, who is an investigator in our office, and in the presence of Mr. Clarke.

The Court: Is he available?

Mr. Koota: Certainly, Judge.

The Court: You will have to produce him.

Mr. Koota: I simply wanted to save time.

The Court: Is that what you insist?

Mr. Hellenbrand: Yes, I insist.

The Court: Very well, he shall be produced.

Mark this for identification, in the meantime.

Mr. Koota: I mark the paper referred to by this witness for identification.

(Marked People's Exhibit 2 for identification.)

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(Conference at bench.)

The Court: Counsel will concede that the signature on this waiver of immunity is the defendant's signature. Counsel will concede that.

Mr. Koota: I then offered People's Exhibit 2 for identification.

Mr. Hellenbrand: Let me just show it to my client.

The Court: Surely.

255

(Mr. Hellenbrand confers with the defendant.)

The Court: Am I correct?

Mr. Koota: (To Mr. Hellenbrand) Either you concede it, or you do not. If you do not concede it, I will prove it in my own way.

The Court: What is the point?

Mr. Koota: There is a question. I do not want a discussion in the presence of the jury. They cannot concede it as it is, and I do not want it.

Mr. Hellenbrand: I cannot concede the paper as such. If you want me—

Mr. Koota: No. Just a minute. Do not make any statements.

Mr. Hellenbrand: I am not making any statements.

The Court: Either concede it as it is, or do not concede it.

Mr. Hellenbrand, let us preserve the rights of everybody here. Let us try it in
257 a lawyerlike way. If there is no concession, then the District Attorney will proceed.

Mr. Koota: Prove it in the regular way.

Mr. Hellenbrand: I would rather do it.

The Court: I understand there is no concession?

Mr. Hellenbrand: There is no concession. I have to withdraw it.

The Court: All right.

By Mr. Koota:

Q. Now, you administered an oath on March
258 7, 1951, to the defendant? A. I did.

Q. Will you tell the Court and jury just what, if anything, you said or did? A. Do you want me to stand up?

Q. Yes. A. (Rising.)

Q. Just tell us how you did it. A. "Do you solemnly swear the testimony you shall give this Grand Jury shall be the truth, the whole truth and nothing but the truth, so help you God?"

Q. Did the defendant say anything to that? A. He answered "I do."

Q. Now, on that day, March 7, 1951, was the

defendant handed a financial questionnaire? A. He was.

Q. I show you this paper, and ask you if this is substantially the form of financial questionnaire which was handed to the defendant?

Mr. Hellenbrand: That I object to, your Honor.

Mr. Koota: Just a minute. Let me finish my question.

Mr. Hellenbrand: I object to that, if your Honor please, as not bearing on the issues relevant to this indictment. 260

Mr. Koota: Would your Honor care to hear me on that?

The Court: No. Overruled.

Mr. Hellenbrand: Exception.

By Mr. Koota:

Q. The Court has ruled you may answer, Mr. Chadeayne (handing document to witness). A. That is the form of questionnaire that the Jury was handing out at that time. 261

Mr. Koota: I offer it in evidence.

Mr. Hellenbrand: I object to it, if your Honor please, on the same ground.

The Court: Overruled.

Mr. Hellenbrand: Exception.

(Marked People's Exhibit 3 in evidence.)

By Mr. Koota:

Q. Now, when, if at any time, did the defen-

dant reappear before the Grand Jury after March 7, 1951? A. In October, 1952.

Q. What date? Do you have any records with you which refresh your recollection? A. The 22nd.

Q. Of October, 1952? A. That's right.

Q. On that day was he given another financial questionnaire?

Mr. Hellenbrand: That is objected to, if your Honor please. We are now dealing with a second questionnaire.

263 The Court: Overruled.

Mr. Hellenbrand: Exception.

A. He was given another questionnaire.

By Mr. Koota:

Q. Did he reappear before the Grand Jury after that? A. Yes, sir.

Q. When was the next time he appeared before the Grand Jury? A. November 12 of 1952.

264 Q. At that time, in substance, did he ask for additional time to fill out his questionnaire and return it?

Mr. Hellenbrand: That is objected to, if your Honor please. I do not know that that makes any difference.

The Court: Sustained, on the ground that it is leading. You may ask a question in proper form.

Mr. Koota: Yes.

By Mr. Koota:

Q. Now, on November 12, 1952, did the defendant testify? A. Yes, he did.

Q. Will you tell the Court and jury in substance what he said?

Mr. Hellenbrand: I object to that. The minutes of the Grand Jury—

Mr. Koota: I withdraw the question.

Mr. Hellenbrand: (continuing)—are the best evidence. 266

The Court: Sustained.

Mr. Koota: I will withdraw the question.

By Mr. Koota:

Q. Did the defendant thereafter appear before the Grand Jury on December 22, 1952? A. He did.

Q. Was a question asked of him before the Grand Jury on that day? A. Yes, sir.

Q. Did he answer the question? A. No, sir. 267

Q. Did he refuse to answer the questions on that day? A. He refused to answer and read a statement.

Q. Now, thereafter did the defendant appear before the Grand Jury again on January 5, 1953? A. Yes, sir.

Q. Was the question put to the defendant before the Grand Jury on that day? A. Yes, sir.

Q. Did the defendant answer that question?

Mr. Hellenbrand: I object to that, if your Honor please.

The Court: Overruled.

Mr. Hellenbrand: Because that is an operation of his mind, asking the witness for a conclusion.

Mr. Koota: Whether he answered, I said.

The Court: Mr. Hellenbrand, I thought we are going to try an issue here. Do you want me to sustain your objection? Does it get us anywhere? I mean, you are such a fine lawyer that you know what the point is in the case. Is there any question about
269 it? You said in your opening to the jury that the man refused to answer the question.

Mr. Hellenbrand: That particular question.

Mr. Koota: That is all I asked, was the question put.

The Court: Read the question. I do not think there will be any objection to it, will there? Read the question that was put to the defendant, and ask whether he refused to answer the question. It will save a lot
270 of time, instead of bringing the stenographer here and all of that business.

Mr. Koota: That I have to have, Judge, unless they concede the accuracy of the testimony and all of the proceedings, I must have the stenographers here to identify them.

The Court: Very well, do it your way.

By Mr. Koota:

Q. Now, Mr. Chadeayne, in March, 1951, and on the subsequent dates during which this defen-

dant appeared before the Grand Jury, will you tell the Court and jury what this Grand Jury was investigating?

Mr. Hellenbrand: Now, I conceded that, that they were investigating the bookmaking and gambling. We read it from the order which appointed this Grand Jury.

The Court: The question is whether or not counsel will concede. Counsel does not have to concede it, and no unfavorable inference will be drawn if counsel refuses to concede that the Grand Jury was investigating the tie-ups, as alleged, between grafting policemen and these bookmakers. That is what they were investigating. 272

Mr. Hellenbrand: That is what they were investigating.

The Court: They were trying to find out whether any of these policemen had swollen bank accounts and swollen assets which could be traced to the graft that was allegedly being passed by the bookmakers to the police, so that the bookmakers would have protection and carry on their business without interruption by the police. That is what this Grand Jury was investigating, Mr. Chadeayne? 273

The Witness: Correct, sir.

The Court: That is conceded?

Mr. Hellenbrand: That they were investigating that, yes.

The Court: And they had a right to investigate that under their order?

Mr. Hellenbrand: They had a right to investigate that.

274 *Raymon H. Chadeayne—for People—Direct*

The Court: Yes, sir. That is as far as we are going. Is that all you want to show?

Mr. Koota: I want to show one further thing, if the Court pleases.

The Court: All right.

By Mr. Koota:

Q. Now, some time in September of 1950, Mr. Chadeayne, was one Harry Gross arrested?

275 Mr. Hellenbrand: I object to that, if your Honor please. That is prejudicial, and I move for the withdrawal of a juror.

The Court: No. Motion denied. That is all beside the point now, whether Harry Gross or Christopher Columbus or Joe Doakes was arrested. It is now conceded before this jury that this Grand Jury was in operation according to law, that they were making this investigation to which I have already referred and that is all that is necessary.

276 Mr. Koota: I have to show the relevancy of the question. That is not conceded.

The Court: The relevancy of the question also will be conceded, I take it, inasmuch as counsel has already conceded the rest.

Mr. Koota: In other words, if there is a concession that there was a proper and legal interrogatory, then I do not need this testimony.

Mr. Hellenbrand: I cannot give you the concession that there was a proper and

legal interrogatory asked him under the waiver of immunity.

The Court. No. That is a different question. You are right, Mr. Hellenbrand, in making the record clear on that. I am glad that you did. You are not conceding that this man committed a crime when he refused to testify. That is the issue in the case. You are conceding that the Grand Jury had the general right to ask the question, that it was a material question? 278

Mr. Hellenbrand: Yes, the general question, but that they had no right under the circumstances.

The Court: Under the circumstances, but the question itself was proper as a question?

Mr. Hellenbrand: As a question.

The Court: Is that enough?

Mr. Koota: In other words, if the Court pleases, the indictment charges that if the following question were asked of this defendant on January 5, 1953: "I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers?" 279 The indictment also charges that on December 22, 1952 the following question was put to Mr. Regan, the defendant, in the Grand Jury: "While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers?" End of the question.

Now, if the defendant will concede that

those two questions are legal and proper interrogatories, then it will obviate that proof.

The Court: Let me make it plain and see if it will be satisfactory to both of you gentlemen.

As I understand Mr. Hellenbrand's position, it is simply this: He said that under proper circumstances, the Grand Jury would have the right to ask that question.

281 He says that these were not the proper circstances, for certain reasons. That is his point. He said the Grand Jury was working along those lines and was delving into these questions but—that they had a right to delve into these questions. He makes a special point here that under the circumstances, as he claims that obtained at the time, that this man had a right to refuse to answer, a legal right to refuse to answer.

Mr. Hellenbrand: To refuse to answer.

The Court: That is the defense in this case.

282 Mr. Koota: I understand that is the defense, your Honor, but—

The Court: Not that the Grand Jury was not within its powers in asking a specific question, provided the defendant's rights were protected. That is the point, Mr. Hellenbrand, am I correct?

Mr. Hellenbrand: You are correct.

The Court: That is simple English, is it not?

Mr. Hellenbrand: That is simple English.

The Court: We are trying to use simple

English so these twelve people in the jury box, who ar not lawyers, will understand what we are talking about.

Mr. Hellenbrand: May I very earnestly say that the bringing in of the name of Harry Gross into this situation, without tying it up to my defendant, is prejudicial.

The Court: (To the jury) Gentlemen, dismiss the name of Harry Gross in the matter. It has no bearing on the case one way or the other. Leave it to me. I will 284
present the matter to the jury in such form that they will understand what the issue is in this case. We are not trying Harry Gross or Joe Doakes or some other men. We are just trying a very simple question here as to whether this defendant had a right to refuse to answer a question that a Grand Jury would have, under ordinary circumstances, the right to put. Correct?

Mr. Hellenbrand: Yes, that's right.

The Court: That is the issue in the case, right?

285
Mr. Hellenbrand: Right.

Now, let the record show that I have excepted to that portion of your Honor's ruling wherein I have said it was prejudicial.

The Court: Now we are down to brass tacks.

Mr. Koota: Judge, the only concession that will satisfy the law and the People is a concession that these two questions which I have read and which are set forth in the indictment, that those questions are relevant and pertinent and material to the

inquiry which the Grand Jury was conducting on that day.

The Court: That is conceded.

Mr. Koota: Is that conceded?

The Court: (To Mr. Hellenbrand) You concede that the question is relevant?

Mr. Koota: That is all I am asking for.

The Court: (To Mr. Hellenbrand): You concede that the question is material?

Mr. Hellenbrand: To the investigation.

287 The Court: To the investigation.

Mr. Koota: That is all I ask for.

The Court: Mr. Hellenbrand concedes that. There is only one main issue that he raises in this case. He said that the man signed a waiver of immunity but he did not know what he was signing; he did not have full appreciation of what he was signing and that, therefore, the waiver was inactive and inoperative and that therefore, if he was compelled to testify on the basis of that waiver, his constitutional rights were being violated; is that not right?

288 Mr. Hellenbrand: That is not what I say, Judge. That is part of what I say.

The Court: All right.

Mr. Hellenbrand: I say one other thing, that there was an affirmative duty of the prosecuting attorneys—

The Court: That is part of the question as to whether the waiver was operative.

Mr. Hellenbrand: Because I said to your Honor that even if Mr. Regan understood it, which I am not conceding, but even if he understood it, it was the affirmative duty of the District Attorney to tell him.

The Court: That is your contention.

Mr. Hellenbrand: That is my contention.

The Court: But I am going to rule on that. I am going to tell the jury what the law is.

Mr. Hellenbrand: Right.

The Court: They will follow the law as I give it to them and not the District Attorney or as the lawyer gives it to them. The law will come from the gentleman on the bench, not because I am superior to 290
these lawyers, but because under our law it is my duty to tell the jury what the law is, and the jury has to follow the law as I give it to them.

All right; step down, Mr. Chadeayne.

Mr. Koota: Then we have that concession about the relevancy, the materiality of the questions alleged in the indictment to the Grand Jury investigation?

The Court: Mr. Koota, I think Mr. Hellenbrand has gone far enough in saving time, and nobody appreciates it more than 291
I do. He saved maybe two hours of testimony here by this concession.

Mr. Koota: Very well, your Honor.

The Court: It is very clear, it is very succinct; nobody can misunderstand it. These questions, in other words, that Mr. Chadeayne and his Grand Jurors, put to this witness, the defendant, were relevant questions; they were not questions in the wild air.

(To the jury) Do you understand? He was not being asked when Christopher

Columbus discovered America. He was asked material, relevant questions. As to whether they could force him to answer, that is the issue in the case.

Mr. Koota: That is the point.

The Court: And we will deal with that as we go along during the trial.

Is everything clear? Do you all understand it?

Mr. Koota: That is all, Mr. Chadeayne.

293 The Court: Do you want to cross examine?

Mr. Hellenbrand: Yes, please.

The Court: We will take a recess now until two o'clock for luncheon.

Do not discuss the case. Keep your minds open.

(Luncheon recess.)

AFTERNOON SESSION.

294

2:00 P.M.

(Jurors returned; trial resumed.)

Mr. Hellenbrand: If your Honor please, I would like to cross-examine Mr. Chadeayne.

Mr. Koota: Your Honor, Mr. Strimpel is to identify minutes. It will only take a few minutes.

SIDNEY STRIMPEL, 120 Schermerhorn Street, Borough of Brooklyn, City of New York, called as a witness for the People, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Koota:

Q. Mr. Strimpel, are you an official court stenographer assigned to the County Court of the County of Kings? A. Yes, sir.

Q. On January 5, 1953, was there a proceeding pending in this court before the Honorable Samuel S. Leibowitz with respect to the application regarding Michael J. Regaan as a witness before the Grand Jury? Were certain things said in the course of that hearing? A. Yes, sir. 296

Q. By the Court and by myself? A. Yes.

Q. And by the attorney for Mr. Regan? A. Yes, sir.

Q. Did you record stenographically all that took place on that proceeding on January 5, 1953? A. I did.

Q. You recorded it on the stenotype machine? A. Yes. 297

Q. Did you transcribe it into typewritten form? A. I did, sir.

Q. I show you this volume and ask you whether this is the typewritten transcript of the stenographic notes of January 5, 1953 (handing)? A. It is, sir.

Q. Did you compare that transcript which I have just shown you with your stenotype notes? A. Yes.

Q. Is it an accurate transcript of your notes? A. It is.

298 *John J. Braff—for People—Direct*

Mr. Koota: I ask that it be marked for identification.

(Marked People's Exhibit 4 for identification.)

Mr. Koota: Your witness.
Mr. Hellenbrand: No cross examination.

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299 John J. Braff, 120 Schermerhorn Street, Brooklyn, New York, called as a witness for the People, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Koota:

Q. Mr. Braff, on December 22, 1952, were you assigned as the court stenographer to Part I of the County Court? A. Yes, I was.

Q. Was there a certain proceeding pending with respect to a witness, Michael J. Regan? A. Yes,
300 there was.

Q. Did you make stenographic notes of the proceedings pending on that day in Part I of the County Court? A. I did.

Q. Did you thereafter transcribe those notes into typewritten form? A. Yes, I did.

Q. I show you this volume and ask you if this is the typewritten transcript of the stenographic notes of the proceedings on December 22, 1952 in Part I before Judge Leibowitz (handing to witness)? A. These are the transcribed notes.

Q. Did you compare the typewritten transcript with your stenographic notes? A. Yes, I did.

Q. Was it a true and accurate copy of those stenographic notes? A. It is.

301

Mr. Koota: I ask that the transcript of December 22, 1952 be marked for identification at this time.

(Marked People's Exhibit 5 for identification.)

Mr. Koota: Your witness.
Mr. Hellenbrand: No cross.
The Court: All right.

302

RAYMON H. CHADEAYNE, resumed.

Cross Examination by Mr. Hellenbrand:

Q. Mr. Chadeayne, you are the Foreman, are you not, of the Special Grand Jury, and you have been the Foreman since its inception; is that correct? A. That's correct, sir.

Q. And during the course of the investigation, this Grand Jury has had before it a great many witnesses; is that correct? A. That is correct, sir. 303

Q. Now, were you present in the Grand Jury on March 5, 1951? A. On March 5th?

Mr. Koota: You mean March 7th.

By Mr. Hellenbrand:

Q. March 7th, excuse me, 1951? A. March 7th, yes, sir.

Q. Prior to that time did you know Mr. Regan? A. No, sir.

Q. And so for the first time you met Mr. Regan

304 *Raymon H. Chadeayne—for People—Cross*

when he came in before the Grand Jury; is that correct? A. That's correct.

Q. Now, the Grand Jury room where the Grand Jury meets, that is on the fourth floor; is it not? A. That is correct.

Q. And prior to 1951 you have been in and out of the corridors and out of the Grand Jury room; is that correct? A. Yes, sir.

Q. Prior to Mr. Regan going into the Grand Jury on March 7, 1951, were you in the outer hall-
305 way, outside of the Grand Jury room? A. I would not remember that.

Q. Were you coming— A. Well, I had to go through it to get into the Grand Jury.

Q. Now, adjacent to the Grand Jury room, am I correct in stating that there are two small rooms? A. That is correct, sir.

Q. And leading to these two small rooms is a little corridor? A. That is correct.

Q. All right. Now, what is the size of that corridor to these two rooms?

Mr. Koota: That is objected to, if the
306 Court pleases.

The Court: Overruled.

A. What is the size of it?

Q. Yes, the size of the corridor? A. I would not want to hazard a guess.

Q. Is it three feet in width? A. No. I would guess it would be about four feet.

Q. And this corridor leads to two outer or inner rooms; is that right? A. It leads to two other rooms.

Q. Do you know how many people were present before the Grand Jury on March 7th, 1951? A. No, sir.

Q. Do you know how many people signed waivers of immunity on March 7th, 1951? A. No, sir.

Q. Are there records that the Grand Jury keeps as to how many people signed waivers of immunity on March 7, 1951? A. There must be in the Grand Jury minutes.

Q. Now, Mr. Chadeayne, can you tell me, if you know, how many policemen appeared before the Grand Jury who signed waivers of immunity on March 7, 1951? A. Of my own recollection, I do not know. 308

Q. Would you say that there was more than one?

Mr. Koota: I object to that.

The Court: He says he does not remember. Next question.

By Mr. Hellenbrand:

Q. But you remember Mr. Regan being there with a waiver; is that right? A. That is correct.

Q. And did you see this waiver that he signed, in the Grand Jury room? A. Yes, I saw it. 309

Q. Did you ask Mr. Regan any questions as to that waiver and the signing of that waiver? A. No, sir.

Q. Did anybody in the Grand Jury, a member of the Grand Jury ask Mr. Regan as to whether he had signed that waiver? A. No, they didn't.

By the Court:

Q. Was there an Assistant District Attorney there? A. There was.

Q. Did the Assistant District Attorney ask him questions about the waiver? A. He did.

310 Q. That is in the presence of the Grand Jury? A. That is correct.

Q. And in the Grand Jury room while the Grand Jury was holding its session? A. That is correct.

The Court: All right, next question.

By Mr. Hellenbrand:

311 Q. This waiver of immunity was part of the exhibit before the Grand Jury on March 7, 1951; is that correct? A. Yes, sir.

Q. Now, I call your attention, Mr. Chadeayne, to the waiver of immunity.

Mr. Hellenbrand: May I have it, Mr. Koota?

Mr. Koota: Yes. It is not in evidence.

(Handing document to Mr. Hellenbrand.)

By Mr. Hellenbrand:

312 Q. Marked—

Mr. Koota: People's Exhibit 2 for identification.

Q. Marked People's Exhibit 2 for identification, and I ask you whether or not this is the paper that you saw on that day (handing to witness)? A. No, I did not handle it.

Q. Did you see that document at all? A. I saw a waiver of immunity; I don't know whether it was this document or not, and Mr. Regan was asked if he signed it, and he said he did.

Q. And do you know, Mr. Chadeayne, as to who wrote in the words "John Doe" which appear on that waiver?

Mr. Koota: That is objected to, referring to a document which is not in evidence.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Now, when Mr. Regan said that he had signed that waiver of immunity, Mr. Chadeayne, did you call his attention to anything that was contained in that waiver of immunity? A. Did I? 314

Q. Yes. A. No.

Q. Did anyone in the Grand Jury call his attention to what was contained in that waiver? A. The Assistant District Attorney.

Q. You say that the Assistant District Attorney called attention of Mr. Regan to the writing in that waiver of immunity?

Mr. Koota: I object to that. He did not say that at all. He was talking about writing. Besides, the minutes of the proceedings on March 7th speak for themselves, if the Court pleases. They are the best evidence, and they will be offered in evidence here. 315

The Court: Suppose you call this witness back in the event the minutes are not offered in evidence. I will let you call him back for further cross examination, unless you challenge the authenticity or the accuracy of the minutes.

Mr. Hellenbrand: I have not seen the minutes.

316 *Raymon H. Chadeayne—for People—Cross*

The Court: (To Mr. Koota) Suppose you show them to counsel. That may save time.

The stenographer is present. It may be that you will be more interested in what the stenographer has than the recollection of Mr. Chadeayne.

Mr. Koota: Only pages 67 and 68.

The Court: (To Mr. Hellenbrand) You are not bound by what I say, and I am not telling you how to try your case. You feel free to try it the way you see fit.

317

Mr. Koota: May the record show that I have exhibited the minutes of March 7, 1951 to Mr. Hellenbrand, the minutes with reference to Mr. Regan.

The Court: Are these minutes in evidence?

Mr. Koota: They are not in evidence yet.

Mr. Hellenbrand: These minutes, if your Honor please, are incorporated in the minutes of the stenographer that were offered for identification just a while ago,

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because at the preliminary hearing they were read into that record.

The Court: Is there any portion of the minutes that you deem material at this time?

Mr. Koota All of it is material.

The Court: It may be entered in evidence, I mean on this particular point?

Mr. Hellenbrand: I have no objection to the People offering in evidence the minutes of the preliminary hearing that took place before your Honor on the 22nd, and on the 5th of January.

The Court: The minutes that we are referring to are the minutes before the Grand Jury; is that not right? Now, with Mr. Chadeayne on the stand, we are concerned principally with what happened before the Grand Jury, not what happened in this room.

Mr. Koota: Then I will offer in evidence at this time, if the Court pleases, the minutes of the proceedings of March 7, 1951, before the Grand Jury with respect to 320
Michael J. Regan, which consists of pages 67 and 68 of a volume entitled "December, 1949 Grand Jury. Wednesday, March 7, 1951."

The Court: Will you please let Mr. Hellenbrand have these minutes, so he can look them over?

Mr. Koota: I have shown them to him, your Honor.

The Court: Show them to Mr. Hellenbrand again.

Mr. Koota: Yes, your Honor. (Handing document to Mr. Hellenbrand.) 321

Mr. Hellenbrand: I have no objection.

The Court: Mark these minutes in evidence.

(Marked People's Exhibit 6 in evidence.)

The Court: Is it conceded that the man before the Grand Jury was this defendant, not some other Michael Regan?

Mr. Hellenbrand: Yes.

The Court: You may read it, Mr. Koota.

Mr. Koota: People's Exhibit 6 in evidence.

The Court: Let it be clear now. What are you about to read?

Mr. Koota: I am about to read the stenographic minutes of Michael J. Regan's first appearance before the Grand Jury on March 7, 1951.

The Court (To the jury): Is that clear, gentlemen? This is the first time it is
323 claimed that the man appeared before the Grand Jury, of which Mr. Chadeayne was and still is the Foreman. Mr. Chadeayne, I understand, is now sitting in the Foreman's chair. It is like a judge is occupying a bench, with the Grand Jury sitting around him. Is that correct?

The Witness: That is correct.

The Court: With a stenographer there like the relative position of Mr. Strimpel here, our shorthand reporter here?

The Witness: Yes.

The Court: There is an Assistant Dis-
324 trict Attorney in the room, asking questions before the Grand Jury of the witness?

The Witness: Yes.

The Court: And the witness was this defendant; is that the thing?

The Witness: In about the same position as Mr. Koota.

The Court: Now, you have administered an oath to him, he has been sworn, as you have testified, and now these questions and these answers occurred; is that right?

The Witness: Yes.

The Court: (To Mr. Koota) You may read the questions and the answers.

People's Exhibit 6 Read Into Record 325

By Mr. Koota:

Q. Only one question, Mr. Chadeayne. The Assistant District Attorney who asked the questions of Mr. Regan on that day was Mr. Gerald V. Clarke? A. Mr. Clarke.

The Court: Is Mr. Clarke around?

Mr. Koota: He is, your Honor.

The Court: Have him come into the courtroom and be identified.

326

Mr. Koota: I think he is in the Grand Jury now, your Honor.

The Court: All right.

Mr. Koota: May I continue in the meantime?

The Court: Yes.

Mr. Koota: (Reading)

"Michael J. Regan, residing at 3819 Harper Avenue, Bronx, New York, shield Number 19508, having been called as a witness, testified as follows:

327

"*By Mr. Clarke*:

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

328 *People's Exhibit 6 Read Into Record*

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

"Waiver of immunity referred to received in evidence and marked People's Exhibit 317, of this date.

"(Witness was thereupon sworn.)

"Q. Patrolman Regan, I show you this questionnaire, which I want you to take home with
329 you, filling it out completely and returning to this Grand Jury with it on March 28th, at 2:30 o'clock in the afternoon, three weeks from today. In the meantime get in touch with your commanding officer and notify him that you are to be back here on that date? A. All right.

"Mr. Clarke: Thank you for coming in."

Mr. Koota: That includes the minutes
330 of that day.

(A man enters the courtroom.)

Mr. Koota: Here is Mr. Clarke now.

By Mr. Koota:

Q. Mr. Chadeayne, I call your attention to the gentleman who has just come into this room. Is that Mr. Gerald V. Clarke, the Assistant District Attorney who questioned Mr. Regan on March 7, 1951 A. It is.

Mr. Koota: May I ask that the person identified give his name?

The Court: Yes.

Mr. Koota: To the stenographer.

The Man Addressed: Gerald V. Clarke.

Mr. Koota: Your address:

Mr. Clarke: 385 Argyle Road, Brooklyn.

Mr. Koota: You are an Assistant District Attorney?

Mr. Clarke: That's right.

The Court: (To Mr. Clarke): You may 332
retire, Mr. Clarke.

Mr. Koota: Thank you.

(Mr. Clarke retires from the courtroom.)

Mr. Koota: All right, you may continue.

By Mr. Hellenbrand:

Q. Now, Mr. Chadeayne, will you please look at the minutes of the Grand Jury on that day, and tell us, please, how many patrolmen appeared before the Grand Jury on that day? 333

Mr. Koota: I object to that, if the Court please.

The Court: Sustained.

Q. Now, Mr. Chadeayne, when you went into the Grand Jury in the afternoon, do you recall what time it was?

Mr. Koota: What day is he talking about?

Q. On March 7, 1951?

334 *Raymon H. Chadcayne—for People—Cross*

Mr. Koota: There is no evidence it was in the afternoon of that day.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Do you remember whether or not this was in the afternoon or was it in the morning? A. The records indicate it was in the afternoon.

Q. All right. Now, did the Grand Jury sit that particular morning, do you remember? A. They
335 did.

Q. Did they go to lunch? A. Yes, sir.

Q. Do you remember what time they came back from lunch? A. No, but the ordinary procedure would be to be back around between 1:30 and a quarter to 2:00.

Q. All right. Now, when you got back at about a quarter to 2:00, in order to get into the room of the Grand Jury, you have to pass a lobby, a hallway; is that not true? A. You have to pass a hallway, yes.

Q. And can you tell us whether or not there
336 were any people present in the lobby of the hallway as you went into the Grand Jury room?

Mr. Koota: That is objected to.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Were there any people in any rooms adjacent to the hallway?

Mr. Koota: Objected to.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Did you see Mr. Clarke talk to anybody in that particular vicinity?

Mr. Koota: I object to that as immaterial.

The Court: Sustained.

By Mr. Hellenbrand:

Q. Did you see Mr. Clarke talk to Mr. Regan? 338
A. No, not outside of the Jury room.

Q. So that outside of the Grand Jury room, you do not know what Mr. Clarke told Mr. Regan; is that correct?

Mr. Koota: I object to it. There is no evidence that he did know. He did not testify that he heard Mr. Clarke speak to Mr. Regan.

By the Court:

339

Q. All you know about this matter is what occurred in the Grand Jury room; is that right, Mr. Chadeayne? A. That is correct.

Q. You do not know what happened outside of the Grand Jury room? A. I don't know.

The Court: All right, you may proceed, Mr. Hellenbrand.

By Mr. Hellenbrand:

Q. Do you know where these people, where Mr. Regan signed the waiver of immunity? A. No, other than it was not in the Grand Jury room.

340 *Raymon H. Chadeayne—for People—Cross*

Q. So that, Mr. Chadeayne, am I correct in stating you do not know where he signed it?

The Court: You do not have to repeat it. It is clear. Of course, his credibility is for the jury, naturally, but the man says that that is all he knows is what happened in the Grand Jury room; he was the Foreman of the Grand Jury. That is all he knows.

341 *By Mr. Hellenbrand*:

Q. Now, Mr. Foreman, Mr. Chadeayne, when Mr. Regan came before the Grand Jury, you heard Mr. Clarke ask him whether or not he understood; is that correct? A. That is correct, sir.

Q. Did you call to the attention of the defendant any particular part of this waiver of immunity?

Mr. Koota: I object to it. There is no—

342 The Court: Sustained.

By the Court:

Q. Everything that transpired is in those minutes; is that right, Mr. Chadeayne? A. Yes, sir.

Q. Everything that was asked and what was said was put down by the stenographer; right? That is correct.

Q. That is the official stenographer of the Grand Jury? A. Right.

By Mr. Hellenbrand:

Q. Now, Mr. Chadeayne, Mr. Regan appeared before the Grand Jury on December 22, 1952; is that correct? A. December 22nd?

Q. December 22nd. A. Yes, sir.

Q. And at that time the District Attorney asked Mr. Regan a question as to whether or not he had ever taken any money from bookmakers; is that correct? A. A similar question.

Q. Or in that form, substantially that form; is that right? A. Substantially that form. 344

Q. Yes. At that time Mr. Regan read a statement, did he not? A. That is correct.

Q. Do you recall the substance of the statement, Mr. Chadeayne?

The Court: Do we have the minutes here?

Mr. Koota: We have all the minutes, and if he will let me, I will offer them.

The Court: Let us have the minutes. That would be more accurate, I take it.

Mr. Koota: Now, we can save a great 345 deal of time, of course.

The Court: Show them to Mr. Hellenbrand; let him look them over.

Mr. Koota: I will show him the minutes of October 22, 1952, November 12, 1952, December 22, 1952, and January 5, 1953.

(Harding documents to Mr. Hellenbrand.)

The Court: Have you seen these documents before?

Mr. Hellenbrand: No, I have not.

The Court: Suppose you take your time, Mr. Hellenbrand. There is no hurry about

346 *Colloquy*

this. Look them over carefully and then announce your position.

Mr. Hellenbrand: May I state this: I think that your Honor excluded a question this morning with respect to what transpired in the previous Grand Jury hearings prior to December of 1952 because—

The Court: Did I exclude it?

Mr. Hellenbrand: I am not going to make a categorical statement, but that is my impression.

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The Court: I do not recall excluding any such things, and if I did, they should not have been excluded, that is, that which has been read should not have been excluded.

Take a few moments, and look them over, and you may then proceed.

(To Mr. Koota) Have you given Mr. Hellenbrand all the records in the case concerning his client?

Mr. Koota: No. There are two exhibits, December 22, 1952, and January 5, 1953 of

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the proceedings in this courtroom, your Honor.

The Court: In this courtroom?

Mr. Koota: In this courtroom.

The Court: No. I am speaking only of the Grand Jury.

Mr. Koota: Mr. Hellenbrand has all of the minutes.

The Court: He has all of the documents, all of the minutes?

Mr. Koota: He has, your Honor, with reference to the defendant Michael J. Regan.

The Court: Very well. Mark them for identification, Mr. Strimpel, with consecutive numbers, chronological as to date.

Mr. Koota: I ask that there be marked for identification minutes dated October 22, 1952.

The Court: Do you offer them in evidence?

Mr. Koota: I have not heard from Mr. Hellenbrand yet.

Do you have any objection to them? 350

Mr. Hellenbrand: I have no objection.

Mr. Koota: Then I offer in evidence the following and ask that they be marked as separate exhibits, if the Court pleases: Minutes of the proceedings before the December, 1949 Grand Jury, dated October 22, 1952, wherein Michael J. Regan was called as a witness.

(Marked People's Exhibit 7.)

Mr. Koota: The minutes of the proceedings of November 12, 1952, before the December, 1949 Grand Jury with respect to the defendant Michael J. Regan. 351

(Marked People's Exhibit 8.)

Mr. Koota: Minutes of the Proceedings of December 22, 1952, before the December, 1949 Grand Jury with respect to the defendant Michael J. Regan.

(Marked People's Exhibit 9.)

352 *Colloquy*

Mr. Koota: Minutes of proceedings before the December, 1949 Grand Jury dated January 5, 1953 with respect to the defendant Michael J. Regan.

(Marked People's Exhibit 10.)

The Court: Now, will you be good enough, Mr. Koota, to read these exhibits, so that we can continue the cross examination. Read them in chronological order,
353 please.

Mr. Koota: Yes, your Honor.

The first appearance I have already read. That is March 7, 1951.

The Court (To the jury): In order to help you, we will write the dates on a board. Dates are very confusing sometimes.

What is the first date?

Mr. Koota: March 7, 1951, your Honor. October 22, 1952, November 12, 1952, December 22, 1952, January 5, 1953.

354 The Court: When do you say he appeared in this court before me?

Mr. Koota: He appeared before your Honor on December 22, 1952 and on January 5, 1953.

The Court: We will make an asterisk here next to these two dates, and the asterisks will indicate that he also appeared before me here in this court as well as before the Grand Jury.

Is everything clear? All right.

Mr. Koota: I will take these chronologically, gentlemen. I have read to you the minutes of March 7, 1951.

People's Exhibit 7 Read Into Record 355

October 22, 1952. "Michael J. Regan, having been previously sworn, was recalled as a witness and testified as follows:

"*By Mr. Donlan*:"—

May I interject at this point, if the Court pleases.

By Mr. Koota:

Q. On October 22, 1952, Mr. Donlan questioned Mr. Regan, did he not, Mr. Chadeayne, according to the minutes? A. He did, sir. 356

Q. And is that Mr. Thomas F. Donlan, an Assistant District Attorney in Brooklyn? A. Yes, sir.

Mr. Koota: Continuing, if the Court pleases, with this exhibit:

"Q. What is your name, sir? A. Michael J. Regan.

"Q. And your address? A. 4 Marion Court, Hohokus, New Jersey.

"Q. Were you given a questionnaire to be filled out outside of this Grand Jury? Was it given to you outside of the Grand Jury? A. It was. 357

"Q. Was a subpoena given to you to return on November 12, 1952? A. It was.

"Q. At that time you will bring back the questionnaire completed, is that correct? A. That's right.

"Mr. Donlan: That's all.

"(Thereupon, at 11:05 o'clock A.M. the hearing was adjourned to November 12, 1952, at 10:30 o'clock A.M.)"

358 *People's Exhibit 8 Read Into Record*

Now, People's Exhibit 8, which are the minutes of November 12, 1952.

"Michael J. Regan, having been previous sworn, was recalled as a witness and testified as follows:

"*By Mr. Clarke*:

"Q. Mr. Regan, you have testified previously here under a waiver of immunity? A. I've received a waiver of immunity and
359 signed it, yes.

"Q. And you testified on what date? A. I received a questionnaire three weeks ago.

"Q. On October 22nd you received a questionnaire at that time to bring it in November 12th? A. That's right.

"Q. I understand you have not completed the questionnaire? A. That's right.

"Q. And you need additional time; is that true? A. That's right.

"Q. You are given until December 10th to return this questionnaire to the Grand
360 Jury and I also give you this Subpoena to return to the Grand Jury on that time.

"Mr. Clarke: All right, that's all for this time."

If the Court pleases, People's Exhibit 8 consists of the testimony of another witness having nothing to do with this defendant.

The Court: Take it out.

Mr. Koota: I will simply remove it.

The Court: Remove it, please. In other

words, People's Exhibit 8 should be stricken out?

Mr. Koota: No. People's Exhibit 8 will be all right. I am simply removing the other.

The Court: As deleted?

Mr. Koota: Yes.

The Court: Wait now. Let us get Exhibit 8, that part which is pertinent.

Mr. Koota: I have just read that, your Honor.

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The Court: I am sorry. Remove all of the extraneous matter, so that it will not be before the jury.

Mr. Koota: Precisely, your Honor.

People's Exhibit 9, Minutes of December 22, 1952.

"Michael J. Regan, having been previously sworn, was recalled as a witness and testified as follows:"—

By Mr. Koota:

Q. That was I questioning the witness on that 363
day, was it not, Mr. Chadeayne, Mr. Koota? A. It was.

Mr. Koota: (Reading):

"*By Mr. Koota*:

"Q. Will you give your name? A. Michael J. Regan.

"Q. Your address? A. 4 Marian Court, Hohokus, New Jersey.

"Q. Have you previously testified before this Grand Jury? A. No.

364 *People's Exhibit 9 Read Into Record*

"Q. Have you previously signed a waiver of immunity? A. Yes.

"Q. Were you formerly a plainclothesman? A. Yes.

"Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers? A. I'd like to make a statement at this time.

365 "Q. You want to read it? A. Yes, sir. (Reading) Upon the advice of my counsel I decline to testify on the ground—

"Q. Slower and louder so the Grand Jury can hear you. A. Yes; I'm sorry. You want me to start from the beginning?

"(Reading):

" 'Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.

" 'I claim my Constitutional and Statutory privileges and immunities. It is
366 claimed that I signed a waiver of immunity before this body sometime in March of 1951.

" 'I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity. I should like to add that since I signed the waiver of immunity I have resigned from the Police Department

of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safe- 368
guarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such.'

"Q. Mr. Regan, just one question I want to ask you. A. Yes, sir.

"Q. When this paper, purported to be a waiver of immunity, was signed were you then a member of the Police Department of the City of New York? A. I was.

"Mr. Koota: All right, Mr. Regan, would you step outside."

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On the same day, a few minutes later, Mr. Regan came back into the Grand Jury.

"Michael J. Regan, having been previously sworn, was recalled as a witness and testified as follows:"—

The Court: Wait a minute. This is before he was brought up to court?

Mr. Koota: Yes.

The Court: You may continue.

Mr. Koota: (Reading):

"Michael J. Regan, having been previously sworn, was recalled as a witness and testified as follows:

370 *People's Exhibit 9 Read Into Record*

"*By Mr. Koota*:

"Q. Mr. Regan, you said a moment ago that you did not testify before the Grand Jury? A. Yes.

"Q. But were you called before the Grand Jury? A. Yes.

"Q. Did you appear in this room? A. I did.

"Q. Was an oath administered to you? A. It was.

371 "Q. After the oath was administered to you were you asked questions such as your name and address? A. That's correct.

"Q. Were you then handed a financial questionnaire? A. That's correct.

"Q. Is that correct? A. That's right.

"Q. Were you then instructed to return that questionnaire filled out to this Grand Jury? A. I was.

"Q. When you said a moment ago you did not testify before the Grand Jury you meant other than what you have just stated

372 —you did not give any testimony at any length; is that correct? A. That's correct.

"Mr. Koota: All right, that's all."

Mr. Koota: The last one, People's Exhibit 10, the minutes before the Grand Jury of January 5, 1953.

The Court: Wait. After that happened, am I correct that you brought him up here before me in the courtroom?

Mr. Koota: That's correct.

The Court: There were certain proceedings that occurred before me; is that right?

Mr. Koota: That is right.

The Court: Is that right?

Mr. Koota: That is right.

Mr. Hellenbrand: Now, if your Honor please, I think that we ought to have on the record that he was directed to answer questions under an effective waiver of immunity.

The Court: We will get to that in just a minute. I just want to get the sequence. 374

Mr. Hellenbrand: This is the sequence.

The Court: Yes, please. I will take care of that. Let us rehearse that.

After he appeared the second time before the Grand Jury on that date, December 22nd, then you had Mr. Regan up here before me?

Mr. Koota: And he appeared before your Honor with his attorney.

The Court: And certain proceedings took place here?

Mr. Koota: And Mr. Regan appeared with his attorney Mr. Hellenbrand, before your Honor on December 22nd. 375

The Court: Then do you want to bring out what happened at that time so that we get the chronology of it?

Mr. Hellenbrand: I think that it is important. There are several things in the minutes before Judge Leibowitz that I think are important. I mean the direction as to how he was to answer questions.

The Court: Yes, I think that is a very wise and sensible request. So that we will

376 *Colloquy*

get the chronology of it, so the jury can follow what the chronology of what happened here was.

Mr. Koota: Then in that event I will now offer in evidence People's Exhibit 5 for identification, which is the minutes of the proceedings before your Honor on December 22, 1952.

The Court: All right. That is this proceeding before me. In other words, when
377 he refused to answer, they brought him up here before me for instructions. Now, that is what they are talking about now, what happened before me.

Mr. Hellenbrand: May I have a moment, because apparently they are different from what we have.

The Court: All right, take a few moments to look through them.

(To the jury) Do you want to take a little recess for ten minutes, gentlemen, and smoke a cigarette?

The Foreman: Yes, sir.

378 The Court: Do not discuss the case. Keep your minds open.

Mr. Koota: While he is looking at that, I will show him January 5th also (handing document to Mr. Hellenbrand.)

(After short recess.)

The Court: All right, gentlemen, come up here.

(Conference at the bench.)

Mr. Koota: Your Honor pleases, it is stipulated that on December 22, 1952,—

The Court (To the jury): Will you pay attention, gentlemen, to what the District Attorney is saying, because it is important. It is part of the proof in the case. A stipulation is the same as proof.

Mr. Koota: It is stipulated and agreed between the attorneys for the defendant and the prosecution, that on December 22, 1952, after Regan testified in the Grand 380
Jury, he was brought up before Judge Leibowitz and a hearing was held before Judge Leibowitz in open court, at which the defendant Regan was represented by his attorney, Mr. Hellenbrand. That hearing was not completed on December 22, 1952, and it was adjourned to January 5, 1953, in the morning.

On January 5, 1953, a hearing was held before Judge Leibowitz, the continued hearing, and witnesses were sworn and testimony taken before Judge Leibowitz, and
after the conclusion of that hearing, Judge 381
Leibowitz held that the waiver of immunity theretofore executed by the defendant Regan was effective and directed—

The Court: Not defective.

Mr. Koota: Effective.

The Court: Speak plainly. It was a good waiver of immunity, in simple English. It was binding on the defendant.

Mr. Koota: And Judge Leibowitz thereupon directed the defendant to return to the Grand Jury and answer the questions.

That is stipulated; is that so?

382

Mr. Hellenbrand: Yes, that is so stipulated.

The Court: Is there anybody in the jury box that does not understand what was said? Do not be bashful. You are not lawyers, and if you do not quite understand what was said here, raise your hand and we will try to make it clear. Do all of you understand what was said here?

383

(No response.)

The Court: Let me review it to make sure that you understand.

On December 22nd, when the defendant allegedly refused to testify, refused to answer the questions, according to the procedure, he was brought up before me for a ruling. He had a right to come here and get a ruling from me: Was he required to testify or was he not required to testify. The Grand Jury cannot order anybody to testify; the District Attorney cannot order

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anybody to testify. The Judge can order him to testify, and he has a right to come up before the Judge and say in simple English: "Judge, I want you to tell me whether I must testify or need not testify." He was brought up here, therefore, on December 22nd, after he had appeared twice in the Grand Jury room that day, and there was some discussion and the matter was put over to January 5th. He did not go before the Grand Jury in the morning. He came back here to this court-

room before me and then I conducted a hearing, I took testimony of certain witnesses, and after the hearing I held that Mr. Regan was compelled under the law to go back and testify; that the waiver that he signed was a good waiver.

Now, I want to say to you right now—and I cannot make it any more plain than I am going to make it—that ruling on my part is not binding upon you in the slightest degree. Do you understand that? That 386
is simple English. You are not bound by what I did in that particular instance in the slightest degree, nor will your verdict be effected in the slightest degree by my ruling upon that matter, because I am going to submit that question to you for you to determine, based on all the evidence in the case. Is that simple, is that clear?

(To Mr. Hellenbrand): Does that meet with your approval, Mr. Hellenbrand?

Mr. Hellenbrand: That is my concept, 387
yes.

The Court: How about you, Mr. Mackell?

Mr. Mackell: That's right, your Honor.

The Court: Mr. District Attorney, does that meet with your approval?

Mr. Koota: It does, your Honor, with one possible exception, and that is this, sir: When your Honor said to the jury that your ruling is not binding upon them, I take it you meant your ruling in so far as holding that the waiver of immunity was effective?

388 *People's Exhibit 10 Read Into Record*

The Court: That is right.

Mr. Koota: But you are ruling that your Honor directed him to answer that. That is the fact in the case.

The Court: That is a fact in the case, of course, that I directed him to answer.

Mr. Koota: There is no dispute about that.

The Court: However, I am going to leave it to you, in the light of all the circumstances, to decide the question, among
389 other things, as to whether or not the waiver was effective.

Now, the decks are cleared.

Mr. Koota: Now, if the Court please, the final hearing of this defendant on January 5, 1953 before the Grand Jury, People's Exhibit 10 in evidence:

"Michael J. Regan, having been previously sworn, was recalled as a witness and testified as follows:

"*By Mr. Koota:*"—

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The Court: Wait a minute, please.

(To the jury) Do you understand what is going in now? When I told him he had to go back and testify, they took him back to the fourth floor, where the Grand Jury room is located, and they brought him into the Grand Jury room, apparently. They put him back on the stand, and this is what happened on January 5th, after he left this courtroom and went downstairs to the Grand Jury room.

Is that clear now? Now, Mr. Koota is going to read what happened down in the Grand Jury room.

Mr. Koota (Reading):

"Q. Mr. Regan, this morning you appeared before County Judge Leibowitz, did you not? A. I did.

"Q. There was a hearing conducted before County Judge Leibowitz concerning a statement made by you on your appearance on December 22, 1952 with respect to your 392
testifying? A. That's right.

"Q. Did Judge Leibowitz direct you to return to this Grand Jury and answer all legal and appropriate interrogatories? A. He did.

"Q. Did he tell you, in words or substance, that he overruled your claim that your waiver of immunity was not effective and that when you testified you would have to testify under a valid, effective and legal waiver of immunity? A. He did.

"Q. Now, you have been recalled to this 393
Grand Jury, have you not? A. Yes, sir.

"Q. This proceeding before Judge Leibowitz was about a half hour ago, was it not? A. That's correct.

"Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers? A. I'd like to read a statement at this time.

"Q. Well, first, will you answer the ques-

394 *People's Exhibit 10 Read Into Record*

tion or do you refuse to answer? A. I refuse to answer the question.

"Q. Now, read it slowly and loudly. A. (Reading):

"'Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.

I claim my constitutional and statutory privileges and immunities.

395 "'It is claimed that I signed a waiver of immunity before this body sometime in March of 1951 and that this waiver remains effective and I must testify without any immunity that I would otherwise have. I claim that this waiver is not effective because I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not afforded an opportunity to employ counsel and that I was not advised by anyone that I did not have to sign a waiver nor at the time of

396 the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

"'I claim my Constitutional rights were not properly safeguarded or explained to me and that there is a doubt and uncertainty concerning my status as a witness and my privileges and duties as such.'

"Q. Does that conclude your statement? A. It does.

"Q. Mr. Regan, you were a police officer for nine years before you retired or resigned? A. Yes, sir.

"Q. Were you in plainclothes during that period? A. Part of the time; yes, sir.

"Q. How long were you a plainclothesman? A. In all, I'd say approximately two years.

"Mr. Koota: That is all for the present, Mr. Regan."

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The Court: All right.

Mr. Koota: Now, Mr. Alleyne.

Mr. Mackell: You have not finished with Mr. Chadeayne.

Mr. Koota: All right. Mr. Chadeayne, will you go back to the stand?

The Court: Is that for further cross examination?

Mr. Hellenbrand: Yes. I want to ask him as to December 22nd and January 5th.

The Court: All right.

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RAYMON H. CHADEAYNE, recalled, testified further as follows:

By Mr. Hellenbrand:

Q. Now, Mr. Chadeayne, on December 22, 1952, you were in the Grand Jury, and the Grand Jury were advised for the first time, were you not, that Mr. Regan, the defendant in this indictment, claimed that he had signed an ineffective waiver of immunity; is that correct? A. Yes, sir.

400 *Raymon H. Chadeayne—for People—Cross*

Q. Did you, on December 22, 1952, or any one in the Grand Jury, ask Mr. Regan or make inquiry as to the circumstances surrounding his execution of the waiver of immunity?

Mr. Koota: That is objected to. The exhibit speaks for itself.

The Court: Sustained.

By Mr. Hellenbrand:

401 Q. Did you call any witnesses to the Grand Jury to determine the facts concerning the execution of this waiver of immunity?

Mr. Koota: Objected to.

The Court: He may answer yes or no.

A. Would you repeat the question, please?

The Court: Did you bring in any witnesses before the Grand Jury concerning the manner in which the waiver was obtained or any such subject of that kind?

402 The Witness: No.

By Mr. Hellenbrand:

Q. Now, on January 5, 1953, Mr. Regan appeared again before the Grand Jury; is that correct? A. That's correct.

Q. And he read a statement on that date; is that right? A. He did.

Q. And at that time he claimed that the waiver was ineffective; is that correct? A. Yes, sir.

Q. Did you or the Grand Jury make inquiry then as to the circumstances concerning the signing of the waiver of immunity? A. No, sir.

Q. Now, Mr. Chadeayne, you have been the Foreman of this Grand Jury for about four years; is that correct? A. Yes, sir.

Mr. Koota: Three years, I think.

By Mr. Hellenbrand:

404

Q. Approximately? A. Three and a half years.

Q. Judge Leibowitz charged this Grand Jury, did he not, under the Code of Criminal Procedure? A. He did.

Q. Now, when Mr. Regan claimed, Mr. Chadeayne, that he did not sign this waiver in an effective fashion, did you call a single witness to find out what the circumstances were as to the signing?

Mr. Koota: Objected to, if the Court pleases.

The Court: Sustained. 405

By Mr. Hellenbrand:

Q. This was not the only man who appeared that day and signed a waiver of immunity; is that correct? A. Which day are you referring to?

Q. On March 7, 1951? A. No. There were others.

Q. And it was within the means of the Grand Jury, was it not, to bring in these people and ask them what had happened on that particular day?—

Mr. Koota: Objected to, if the Court pleases.

Q. (continuing) —of March 7, 1951?

The Court: There was no claim about this until—

Mr. Koota: December 22nd.

By the Court:

Q. The end of December of 1952; is that not
407 right?

Mr. Koota: Eighteen months later.

By the Court:

Q. In other words, there was no claim that he did not know that he was signing until a year and three-quarters later; is that not right? A. December 22, 1952.

Q. From March 7, 1951, there was no claim made until December 22, 1952? A. Until Decem-
408 ber 22, 1952.

Q. December 22, 1952 was the first time this man said he did not know what he was signing; is that right? A. That's correct, your Honor.

Q. Although he had been before the Grand Jury on November 12th, on October 22nd, 1952, and March 7th, 1951; is that right? I am merely referring to the dates. A. That's right.

The Court: All right, next question.

Richard E. Alleyne—for People—Direct 409

By Mr. Hellenbrand:

Q. Now, on January 5, 1953, it was within the means of the Grand Jury, was it not, to bring witnesses down who were present on that day?

Mr. Koota: That is objected to, if the Court pleases.

The Court: Sustained.

By Mr. Hellenbrand:

410

Q. Mr. Chadeayne, is it not the duty of the Grand Jury, when they have reason to believe that there is evidence which would explain a particular charge, to bring it before the Grand Jury?

Mr. Koota: That is objected to, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: Exception.

That is all.

The Court: Step down.

Mr. Koota: Mr. Alleyne. 411

Richard E. Alleyne, residing at 219 McDonough Street, Brooklyn, New York, called as a witness for the People, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Koota:

Q. Mr. Alleyne, in March of 1951, were you in the employ of the District Attorney of the County of Kings? A. Yes, I was.

Q. What was your position then? A. Investigator.

The Court: Speak a little louder.
The Witness: Investigator.

By Mr. Kooia:

Q. Attached to the District Attorney's office? A. Yes, sir.

Q. Was that your position on March 7, 1951?
413 A. Yes, sir.

Q. Have you continuously since then and today are you still a Special Investigator in the District Attorney's office of the County of Kings? A. I am still employed but my title is changed to Accountant Investigator.

Q. Now, do you know the defendant, Michael J. Regan? A. Yes, I do.

Q. On the 7th day of March, 1951, were you in the anteroom next to the December, 1949 Grand Jury? A. Yes, sir.

Q. I show you People's Exhibit 2 for identifi-
414 cation and ask you whether the signature of Michael J. Regan was affixed to this paper in your presence (handing to witness)? A. Yes, sir, it was.

Q. Who signed the name "Michael J. Regan" in your presence? A. A gentleman who represented himself as Michael J. Regan.

Q. Who is the gentleman? Do you see him in the court room? A. Yes, sir. The gentleman sitting over here with his hands—

Q. Indicating the defendant? A. Yes, sir.

Q. Now, after he signed his name, did you sign

415

your name as Notary Public? A. Yes. I took the acknowledgment, yes, sir.

Q. Did Michael J. Regan acknowledge that signature "Michael J. Regan"? A. Yes. I asked him was that—

Q. Just a minute? A. Sorry, sir.

Q. Did Michael J. Regan, the defendant, acknowledge that the signature "Michael J. Regan" on People's Exhibit 2 for identification was his signature? A. Yes, sir, he did.

416

Q. Thereafter, did you sign your name as Notary Public? A. I signed, too.

Mr. Koota: I offer People's Exhibit 2 for identification in evidence.

By the Court:

Q. Was it all filled out the way it is now or was it in blank? A. No, sir. We always had them filled out.

Q. The way it is now? A. Yes, sir.

417

The Court: Any objection?

Mr. Hellenbrand: May I examine as to the efficacy of the document?

The Court: Yes. You may examine on the voir dire.

By Mr. Hellenbrand:

Q. Now, Mr. Alleyne, was that document filled out before Mr. Regan signed it? A. Yes, sir, it was.

Q. Do you know who filled it out? A. In part—on this one in part I believe by Assistant District

418 *Richard E. Alleyne—for People—Voir Dire*
By Mr. Hellenbrand

Attorney Clarke, and we had Mr. Regan complete his address, because we did not have any knowledge of his address.

By the Court:

Q. In other words, some of it is in Regan's handwriting? A. Yes, sir.

Q. His address? A. Yes, sir.

419 *By Mr. Hellenbrand*:

Q. Now, in this place where you say it was signed, was up on the 4th floor of this building; is that correct? A. Yes, sir, it is.

Q. And you said it was in an anteroom; is that correct? A. I answered the question I think Mr. Koota asked me. Did it take place in the anteroom, and I said "Yes, sir."

Q. Now, did it take place in an anteroom? A. Yes, sir.

Q. Was Mr. Regan there by himself? A. No.
420 I believe there were many other members of the Police Department at that time present.

Q. Now, let me get particulars as to the room. You are familiar, are you not, with the location on the fourth floor there? A. Yes, sir.

Q. Now, there is a hallway. Is that what you refer to as the anteroom? A. No, sir. As you come in the hallway and you go to the right, you have one smaller room, but then if you continue you have a room that has "District Attorney" on it, I believe.

Q. Now, that second room, the room that has letters "District Attorney", is that what you refer to as the anteroom? A. Yes, sir.

Richard E. Alleyne—for People—Voir Dire 421
By Mr. Hellenbrand

Q. Now, Mr. Alleyne, was there anybody else present with you at the time that Mr. Regan signed this paper? A. As far as I recall, I know there were other members of the Police Department, and also Assistant District Attorney Clarke present.

Q. Was there anybody else from the District Attorney's office other than yourself in this room? A. No. There may have been on that particular date. 422

Q. Now, at the moment Mr. Regan put his signature on that paper, can you tell us, please, how many people were present in that room? A. No. If we were busy at the time taking signatures, I was not too concerned as to just the total number of men present. I was concerned with taking his acknowledgment.

Q. Would you say there were five men in that room? A. No. I could not say as to the number. There were a number of individuals present, but as to the exact number I could not say, sir.

Q. Were there thirty men in that room? A. I could not say, sir. 423

The Court: He says he cannot say. Next question.

Mr. Hellenbrand: All right.

By Mr. Hellenbrand:

Q. Now, how large is this room, Mr. Alleyne? A. Why, I would estimate maybe 10 x 10, 12 x 10.

Q. And this room that is 10 x 10, is there a desk in this room? A. There is, sir.

Q. And how large is this desk? A. It's the

424 *Richard E. Alleyne—for People—Voir Dire*
By Mr. Hellenbrand

average legal size desk, I believe, running 60 inches by 30 inches.

Q. So am I correct in stating that this desk was about 5 x 3, did you say, feet? A. I said 60 inches by 30 inches.

Q. And that was within this room of 10 x 10; is that correct? A. I would say so.

Q. Now, is there a bench in that room? A. There are two benches, I believe, or one long bench.

425

Q. And that one long bench is alongside the wall, is it not? A. It is, sir.

Q. And how wide would you say that bench is?

Mr. Koota: Just a moment, Judge. I have not objected. I must object to this. I do not see the relevancy of this testimony.

The Court: He wants to show that it was a crowded room. Is that not what you want to show, Mr. Hellenbrand?

Mr. Hellenbrand: Yes. I want to show the circumstances.

426 The Court: All right.

By the Court:

Q. There were all policemen in there signing these papers? A. Yes, sir.

Q. They were all policemen? A. Yes, sir.

Q. Members of the Police Department? A. That's right, sir.

Q. Signing these so-called waivers? A. Yes, sir.

Q. Was there more than one waiver being signed there among these policemen? A. Yes, there was, sir.

Richard E. Alleyne—for People—Voir Dire 427
By Mr. Hellenbrand

The Court: All right. Next question, please.

By Mr. Hellenbrand:

Q. And the people were coming and going; is that true? A. Oh, evidently, sir, because some were being called to go before the Grand Jury as we were continuing this process.

Q. Now, was this desk, was this in the center of the room? Where was it when Mr. Regan 428
signed this waiver? A. I don't recall now. The desk was running sort of catercorner. I mean, you have a corner and she's running at an angle across the room from the window.

Q. Would you say that it was in the center of the room or up against the wall? A. No. It was closer to the window, sir, running at an angle.

Q. Mr. Alleyne, how many men could stand in that room with a desk in the condition in which you have just described?

Mr. Koota: I object to that, if the Court 429
pleases.

The Court: Sustained.

By Mr. Hellenbrand:

Q. How many men were there in the room at the time that Mr. Regan signed this waiver? A. As I said before, I could not say how many men were present during the time Mr. Regan signed this waiver of immunity.

Q. Now, at the time that Mr. Regan signed, was a lawyer present? A. I beg your pardon?

Q. Was there a lawyer present who was repre-

senting Mr. Regan at the time? A. Not to my knowledge, sir.

Q. In your presence, did you hear Mr. Clarke or anybody in the District Attorney's office tell Mr. Regan to get himself a lawyer?

Mr. Koota: I object to that, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: That is all.

Mr. Koota: One question.

431

Redirect Examination by Mr. Koota:

Q. On March 7, 1951, there were a number of policemen called; is that right, Mr. Alleyne? A. Yes, sir, there was.

Q. And a number of them signed waivers of immunity, did they? A. Yes, sir, they did.

Q. And then they were called in the Grand Jury? A. Yes, sir.

Q. You took the signatures of all of these policemen on the waivers of immunity they signed?

432 A. Yes, sir.

Q. Just like you did with Regan? A. Yes, sir.

Q. He was treated like all the other policemen, was he? A. Yes, sir, he was.

Mr. Koota: That is all.

The Court: All right. You offer this in evidence?

Mr. Koota: I offer this in evidence, People's Exhibit 2 for identification.

The Court: Do you object?

Mr. Hellenbrand: Yes, I object.

The Court: Objection overruled.

Mr. Hellenbrand: Exception.

The Court: The document will be received in evidence.

(People's Exhibit 2 for identification now marked People's Exhibit 2 in evidence.)

Mr. Koota: May I read it at this time to the jury, if the Court pleases?

The Court: Yes.

434

Mr. Koota (Reading):

"County Court, Kings County

"THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE,

Defendant.

WAIVER OF IMMUNITY

435

"I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, Borough of Brooklyn"—

"Brooklyn" is crossed out and "Bronx" is put in here—"Bx,"—

"of The City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or

436 *People's Exhibit 2 Read Into Record*

on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry for legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

437

"I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(Signed) MICHAEL J. REGAN.

"WITNESS:

"GERALD V. CLARKE

438 "STATE OF NEW YORK,
COUNTY OF KINGS, SS.:

"On this 7 day of March, 1951, before me personally appeared Michael J. Regan, to me personally known and known to me to be the individual described in and who executed the above waiver, and duly acknowledged that he executed the same.

"Richard Eric Alleyne,"

the gentleman who testified previously,

"Notary Public, Kings County."

The People rest, if the Court please.

The Court: The people rest.

Mr. Hellenbrand: Now, if your Honor please, I move to dismiss the indictment on the ground that the People have failed to make out a prima facie case because they have not affirmatively shown that they advised Mr. Regan, prior to the execution of this waiver of immunity, as to his constitutional rights and the fact that he did not have to sign it. 440

The Court: Motion denied.

Mr. Hellenbrand: Exception.

Mr. Koota: May I approach the bench?

The Court: Yes, surely.

(Conference at the bench.)

The Court: Gentlemen, we are going to take a recess until tomorrow morning. Tonight I am going to keep you together. I am doing that on my own motion, because I want to make doubly sure that there is nobody going to read anything about it in 441 the paper or listen to it over the television or the radio. It is in the interest of justice, it is in the interest of fair play to the defendant and the prosecution. So, you won't be so terribly inconvenienced. Only one night that you will be kept together. And there have been juries that have been kept together for weeks. That is a hardship. But I think you will forgive me if I keep you together tonight. You will be kept comfortable and you will have meals, and you will be under the aegis of some

wonderful court officers. They are the best in the country. They are very courteous, they are very nice. They will be very kind to you. They have instructions, under no circumstances is the jury to have any access to any newspapers until the newspapers have been censored, any reference to this case has been deleted. They are not to listen to any news broadcasts over the television or over the radio of any kind,
443 because you do not know in advance what is going to be said by the newscaster or the commentator on the television show.

Other than that, gentlemen, do not discuss the case. Keep your minds open. Reserve decision as to the guilt or innocence of the defendant until the case is finally submitted to you.

Good night.

(Whereupon an adjournment was taken to March 5, 1953, 10:00 A.M.)

444 ———

Brooklyn, New York,
March 5, 1953; 10:00 A.M.

TRIAL RESUMED

(Jurors returned; trial resumed.)

The Court: All right, you may proceed, Mr. Hellenbrand.

Mr. Hellenbrand: Mr. Clarke.

GERALD V. CLARKE, residing at 385 Argyle Road, Brooklyn, New York, called as a witness for the defendant, being first duly sworn by the clerk, Mr. Lehritter, testified as follows:

Direct Examination by Mr. Hellenbrand:

Q. Mr. Clarke, you are an attorney at law duly licensed to practice in the State of New York, are you not? A. I am.

Q. And you are a member of the office of the District Attorney; is that correct? A. That's right. 446

Q. Now, on March 7, 1951, you were in the office of the District Attorney, attached to the Special Rackets Squad; is that correct? A. That's true.

Q. All right. Now, do you recall seeing Mr. Regan on the 7th day of March, 1951, in this building; is that right? A. That's right.

Q. Will you tell his Honor and the jury, please, where you first met Mr. Regan? A. In the anteroom of the Grand Jury, which is as you walk out of the Grand Jury, it's approximately about ten 447 feet to the left.

Q. Had you met Mr. Regan prior to that time? A. I don't think so.

Q. Now, Mr. Clarke, when a man is called to appear before the Grand Jury, the District Attorney can do several things; isn't that right?

Mr. Koota: I object to that.

The Court: Sustained.

448 *Gerald V. Clarke—for Defendant—Direct*

By Mr. Hellenbrand:

Q. Let me ask you this specific question, Mr. Clarke: Now, when the District Attorney's office requests a witness to appear before the Grand Jury, they have a right to request him to sign a waiver of immunity; is that right?

Mr. Koota: Objected to.
The Court: Sustained.

449 Q. Can you tell me, Mr. Clarke, are you familiar with the practice and procedure of calling witnesses before the Grand Jury? A. I am.

Q. And have you participated, as part of your duty in the District Attorney's office, in questioning witnesses before the Grand Jury? A. I am.

Q. And have you, during the course of your employment with the District Attorney, requested people to sign waivers of immunity? A. I did.

Q. Now, Mr. Clarke, when Mr. Regan appeared before the Grand Jury on March 7, 1951, you requested him to sign a waiver of immunity; is that
450 correct? A. I did.

Q. Now, the District Attorney has a right, does it not, Mr. Clarke, to put a man into the Grand Jury without signing a waiver of immunity?

Mr. Koota: Objected to, if the Court pleases; calling for a legal conclusion.

The Court: So that there will be no confusion, it should be stated that that is a question of law.

Mr. Koota: That is what I meant.

The Court: As to what the powers of the District Attorney are.

Mr. Koota: Exactly.

Mr. Hellenbrand: Mr. Clarke, if your Honor please, is an expert, he is a lawyer.

The Court: That is very true, he may be an expert. The question is what happened in this case.

Mr. Hellenbrand: Before I get to what happened, I think—

The Court: This is not a question of expert testimony. It is a question of what happened here.

Mr. Hellenbrand: I have a right to show the procedure so that then I can go to the next step.

The Court: Procedure is a legal question.

(To the jury): Gentlemen, will you give me your attention for a moment. Perhaps I can clear this matter up so that you businessmen will understand what it is all about. I am going to deal with this in my charge, so that you will hear it again possibly in different words than I am using now.

The Grand Jury is conducting an investigation. They subpoena Mr. Brown to appear before the Grand Jury. Mr. Brown must obey the subpoena; he must appear. He cannot do what some woman did in some case we had here recently, where she said, "I am not going to appear." She has to appear; the witness must appear. The witness must go into the Grand Jury room. He cannot say, "I am not going to enter the Grand Jury room." When he gets in the Grand Jury room, he has certain

454 rights. And what are these rights? Let us assume that the crime is burglary. He is put on the witness stand; he is sworn; he is asked by the District Attorney, "Didn't you commit the crime of burglary, didn't you burglarize Mr. Smith's home on Ocean Avenue on such and such a day?" He says, "I refuse to answer. I refuse to answer on the ground that my answer would incriminate me." In other words, what that means is if the witness were compelled to
455 answer, he would become a witness against himself, and the Constitution says you cannot do that, that is absolutely prohibited. Every citizen knows that.

Now, there is a common misunderstanding, which is shared even by lawyers sometimes, that the District Attorney can confer immunity upon a witness. There is no such thing under the law. The District Attorney has no power to grant immunity to any witness for any crime. You pick up the newspapers and you read, "The Dis-
456 trict Attorney is going to give Mrs. Robinson immunity in this case." There is no such thing. The District Attorney has no power to grant immunity to anybody. By immunity I mean freedom from prosecution. There is only a law that can grant immunity in certain cases. You know what I mean already by immunity: Where a man goes in and says, "I committed the crime," but they cannot prosecute him for the cirme even though he confesses to committing it.

There are certain cases where the law

grants immunity where they compel a man to testify. For instance, if they bring a man, Mr. Brown, into that Grand Jury room and he takes the oath and they ask him, "Didn't you take part in a conspiracy to commit a crime? Didn't you engage in gambling activities?" In these three cases, the law grants the man immunity. Remember, gentlemen, what I have said. Where the crime is bribery, where the crime is gambling or where the crime is 458
conspiracy, the law says you can bring a man in there and force him to testify. He cannot say "I refuse to testify." You can force him to testify, and if he refuses to testify, you can punish him for contempt of court under certain regulations, following certain procedures. Why? Because the law says if he testifies, you cannot prosecute him. Therefore, he is not being a witness against himself, he was not incriminating himself. By that I mean he is not subjecting himself to a criminal prosecution if 459
he gives evidence against himself, because the law says in these three cases, namely, gambling, conspiracy and bribery, if you force the man to testify, he is not going to become a defendant, because you cannot prosecute him. Is that clear?

Now, in order to avoid giving the man immunity, in order to avoid the laws which give him immunity, the man is required to sign a waiver of immunity. In other words, he can sign away the privileges and the rights, fundamental in nature, which the

law gives him, and which the Constitution gives him. He can say, "I waive it." "Waive" means "I am willing to forego my rights; I waive them, I relinquish them." These are synonymous words that mean the same thing. By signing a certain paper under certain circumstances, he relinquishes his right not to be prosecuted if he gives evidence against himself. Do you understand? Is that clear to everybody? That is what we mean by a waiver
461 of immunity, where a man knowingly and wilfully signs away or relinquishes or deeds away his right to say, "I refuse to answer." When he signs that paper under those circumstances, then he cannot refuse to answer, and if he answers to the extent where he incriminates himself, he can be indicted, he can be prosecuted for that, whereas, if he did not sign that paper, he could not be prosecuted, but he could be compelled to testify, because the statute gives him immunity; the statute gives him
462 freedom from prosecution. Now, I have used simple English that I think you business people will understand.

In this case, or in similar cases, a policeman who has to do with enforcing the gambling laws, a plainclothesman or vice squad cop, which is the popular name applied to him, is brought before the Grand Jury. He can be put in the Grand Jury on the witness stand, and he can say, "Yes, I took a bribe from a certain bookmaker," and they cannot prosecute him even though he confesses that he committed a crime.

Why can he not be prosecuted? He cannot be prosecuted because the statute says you cannot prosecute him; he gets immunity in this particular class of case by virtue of the law, not because the District Attorney wants to be kind to him or wants to give him a break, as they say. The law gives him that break, the law protects him.

But in order to avoid a man escaping prosecution, he signs a waiver of immunity, and when he signs that waiver of immunity, 464 the law does not protect him any more, provided he signs it under proper circumstances. I have tried to make it plain, so that you will understand the evidence here. It is a little involved, and I am eager to have you business men understand what this is all about. Do you all understand now?

(The jurors nod in the affirmative.)

The Court: All right.

Mr. Hellenbrand: May I except to so 465 much—

The Court: If I have made a mistake, I will correct it.

Mr. Hellenbrand: You said that every citizen knows that he need not be a witness against himself.

The Court: Well, I will withdraw that. That is the law, that a citizen has a right to refuse to answer on the ground that it may incriminate him. He cannot refuse to answer in a gambling or bribery or conspiracy case, because whatever he says can-

466 *Colloquy*

not incriminate him. The statute gives him immunity unless he waives it by signing a waiver.

Now, there is one other law to which I think I ought to call your attention at this time. It is important for you to bear that law in mind, and I will cover it again in my charge.

A public official—a judge, the District Attorney, any public official or a police
467 officer, a fireman, or a public school teacher, when he is brought before a Grand Jury, he must testify, under penalty of losing his job, by signing a waiver. He can say, "Well, now, I don't want to sign a waiver." He does not have to sign a waiver, but he will lose his job. No one can compel him to sign a waiver, but if he does not want to sign a waiver, he loses his job automatically. That is the law, that a public official must testify, he must make disclosures under penalty of losing his job. He can say, "I refuse to answer." There is no-
468 body can take him by the throat and put a chain around him and force the words out of his mouth. He can say "Goodbye, I refuse to answer. It will tend to incriminate me or degrade me." That is his constitutional right. But the laws says that if he is a public official, he loses his job. That is simple. That applies to every public official, including a policeman.

All right, now, is there anything else that you think I have erred in?

Mr. Hellenbrand: Not at the moment, Judge.

The Court: All right. If it is called to my attention, Mr. Hellenbrand, I will correct it.

By Mr. Hellenbrand:

Q. Now, Mr. Clarke, so that the first time you saw Mr. Regan was on March 7, 1951, and you said in one of the anterooms on the fourth floor of this building; is that correct? A. That's correct.

470 Q. Now, do you remember about what time of the day that was, sir? A. I imagine around 10:00 o'clock in the morning.

Q. 10:00 o'clock in the morning? A. Approximately.

Q. Now, Mr. Clarke, this anteroom that you saw the defendant in, will you please tell us your best recollection as to the size of this room? A. I'd say 10 x 10, or 12 x 12, approximately.

Q. And was there a desk in that room, sir? A. There was.

Q. And will you give us, please, the size of that desk in that room? A. About 60 x 2, some- 471 thing like that.

Q. And in addition to the desk, were there any benches in the room? A. There's one bench.

Q. Can you tell us where that bench was, sir? A. Well, if I was sitting here at the desk, the bench was approximately over this way, to my left, about three feet (indicating).

Q. And did that bench extend out of the wall, did it? A. That's right.

Q. And about how wide was that bench extending into the room, sir? A. Oh, about five people could sit on it.

Q. And can you tell me how wide the bench was? A. How wide?

Q. Yes. A. Wide enough for a person to sit there.

Q. Would you say that the bench—

The Court: Let us not spend too much time on that.

Mr. Hellenbrand: All right.

By Mr. Hellenbrand:

Q. Now, on March 7th—

The Court: Was the room crowded? That is what he wants to know; or was it empty?

The Witness: It was crowded at one time.

The Court: All right, let us go ahead.

By Mr. Hellenbrand:

Q. Now, on January 5, 1953, Mr. Clarke, you appeared before Judge Leibowitz and there was a preliminary hearing in connection with this matter; is that correct? A. That's true.

Q. And at that time you gave testimony, sir? A. That's right.

Q. And did I ask you this question and did you make this answer: "Q. And would you say that there were about 35 people present? A. There might be 35 people present."

Mr. Koota: That is objected to, if the Court pleases, whether he so testified.

First, there is nothing inconsistent with what he said.

The Court: Sustained.

Mr. Hellenbrand: Exception. 475

By Mr. Hellenbrand:

Q. How many people were there present in the room at that time, Mr. Clarke? A. As I already stated, it was crowded at one time. There might have been 35 at one time. Again, there might have been five. 476

The Court: They were going in and out?

The Witness: That's right.

The Court: These were all policemen, were they not?

The Witness: I think, your Honor, I could explain that.

The Court: No. Just answer my question.

The Witness: Yes, they were all policemen. 477

The Court: These were all policemen; they were not laymen, were they?

The Witness: No. All policemen.

The Court: All policemen?

The Witness: Yes, sir.

By Mr. Hellenbrand:

Q. How many policemen were present in the room at the time that Mr. Regan signed the waiver of immunity, Mr. Clarke? A. It might have been 35; it might have been 25.

Mr. Koota: I object to the witness guessing. The question was how many were there, if he knows.

The Witness: I don't know.

Mr. Hellenbrand: He has answered, if your Honor please.

The Court: All right. He says there might have been five; there might have been 35. They were going in and out, he says. All right.

479 *By Mr. Hellenbrand:*

Q. Now, when Mr. Regan appeared with the other policemen in the anteroom outside of the Grand Jury, Mr. Clarke, you made a statement to these men, did you not? A. That's true.

Q. And you said several things; is that correct? A. That's right.

Q. And on January 5, 1953, when you testified before Judge Leibowitz, did I ask you this question and—well, let me ask you this. I will withdraw the question. Let me ask you this, Mr.
480 Clarke: Did you make any statements as to this waiver to Mr. Regan? A. I did.

Q. And did you make a separate statement to Mr. Regan or did you make one statement to the group that was in that room? A. I made a statement to the entire group at one time.

Q. At one time? A. That's right.

Q. When you made this statement, do you know where Mr. Regan was? A. I don't know where he was, no. He was in the room, but I don't know where he was standing.

Q. Do you know whether he was in back of you or in front of you? A. He might have been

in back of me; he might have been in front of me.

Q. Could he have been in the hallway, Mr. Clarke? A. No, I don't think he could have been in the hallway, no.

Q. Now, these men who were in this room, were they sitting or were they standing? A. They were standing, outside of maybe five that were sitting on the bench.

Q. Did they wear hats and coats, do you remember? 482

Mr. Koota: I object to that, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: Exception.

By Mr. Hellenbrand:

Q. Now, at that time, Mr. Clarke, did you tell Mr. Regan that if he did not sign the waiver, that you would report that fact to the Police Commissioner? A. I certainly did. 483

The Court (To the jury): Gentlemen, the District Attorney had a perfect right to say that to him under the law. He would be required to report it to the Police Commissioner. When a policeman refuses to sign a waiver in a matter of this kind, he automatically forfeits his job as soon as the Police Commissioner hears about it. The District Attorney would, therefore, be in duty bound to notify the Police Commissioner that a policeman refused to sign a waiver.

You may proceed.

Mr. Hellenbrand: May I note my exception to that particular remark?

The Court: Yes, you have an exception to the statement of the Court.

Mr. Hellenbrand: As to the statement of the what? I did not hear that.

The Court: To the statement of the Court. You have an exception to that. That is the law. It was perfectly proper for this District Attorney to tell this man, "If you
485 don't sign the waiver, I will report to to the Police Commissioner."

(To the jury) You understood what I just said to you, did you not, gentlemen?

(The jurors nod affirmatively.)

By Mr. Hellenbrand:

Q. Now, Mr. Clarke, did you tell Mr. Regan, on or before he signed this waiver, as to what this Grand Jury was concerned with? A. Yes, I did.

Q. You said you told him? A. That's right.

486 Q. Now, you recall testifying before Judge Leibowitz, do you not, on January 5, 1953? A. That's right.

Q. And did I ask you this question, and did you make this statement:

"Q. Did you tell them what this Grand Jury was concerned with with respect to the testimony? A. I didn't."

Mr. Koota: I object to that question, if the Court pleases. He cannot cross-examine his own witness.

The Court: I cannot hear you. What is it?

Mr. Koota: I am sorry, sir. I object to the question. He is cross-examining his own witness at this point. Besides, I see nothing contradictory in what the witness said and what was read in the testimony of January 5, 1953.

The Court: Overruled.

By Mr. Hellenbrand:

Q. Did you make that answer, sir? A. I did. 488

Q. And did you tell Mr. Regan on January 5th—I will withdraw that—on March 7, 1951, Mr. Clarke, that "he is under a duty, as we saw fit, that he should sign such a waiver"? A. That's right. He was under a duty to sign it. He was a city employee.

The Court: Speak up, please. I do not hear you.

The Witness: I said he is under a duty to sign that as being a city employee. If he is going to be put in the Grand Jury, he must sign the waiver. 489

By Mr. Hellenbrand:

Q. Now, Mr. Clarke, this room now you say was crowded with policemen; is that right? A. That's right.

Q. When you made a statement to these policemen, were you standing or were you sitting?

Mr. Koota: I object to that, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: Exception.

490 *Gerald V. Clarke—for Defendant—Direct*

By Mr. Hellenbrand:

Q. Did you make such a statement in a loud voice, or in the voice or in the manner in which you are now testifying?

Mr. Koota: I object to that, if the Court pleases.

The Court: Overruled.

The Witness: I gave it in a voice louder than I am talking now, but it was more
491 than one person present and I wanted my voice to carry to everybody in the room.

By Mr. Hellenbrand:

Q. Now, how much time, Mr. Clarke was there between the time that Mr. Regan was presented with this waiver and the time that he signed it? A. Well, there was 35 there. I would say within approximately 25 minutes everyone was told and signed the waiver. They signed it right in front of me. They didn't move out of the room.

492 Q. Did Mr. Regan sign it in front of you? A. He did. He signed it in front of me.

Q. Did you see him read this waiver of immunity? A. Yes. I gave it to him. The reason I saw him sign the waiver and the reason I saw him read the waiver was because before I came to the Grand Jury—I did it in this case and I did it every case—I made the waivers out myself in the morning, because I had called the Police Commissioner the night before and I knew everybody who was coming over. They told me who was subpoenaed and who was going to be there. When the plainclothesmen came, I brought them, and called their names out, and brought them—

Mr. Hellenbrand: If your Honor pleases, I asked a simple question and I get a speech.

The Court: Yes. What is the question?

(Last question read as follows: "Q. Did Mr. Regan sign in front of you?".)

The Court: What is the answer?

The Witness: Yes, he did.

494

By Mr. Hellenbrand:

Q. So there were about 35 waiver of immunity signed within a space of twenty-five minutes; is that correct? A. That's right.

By the Court:

Q. Was Regan the first one to sign or was he or did he sign afterwards? Was he the very first one to sign? A. I couldn't tell, your Honor, whether he was the first or the thirty-fifth.

Q. Were they all members of the vice squad, 495
this group that was in there? A. They were all former plainclothesmen, all plainclothesmen at that time.

Q. They were plainclothesmen? A. At the time.

Q. As the time that they signed these waivers? A. That's right.

Q. They were all members of the vice squad, so-called? A. Right.

By Mr. Hellenbrand:

Q. Now, at the time that Mr. Regan appeared before the Grand Jury on March 7, 1951, he was

not a plainclothesman any more; isn't that correct? A. He had been a plainclothesman.

Q. Yes, but on March 7, 1951, he had been out of the plainclothes squad; isn't that true? A. He might have been; I don't know. It didn't make any difference to me whether he was or not.

Q. But you did not know at that time whether Mr. Regan was a plainclothesman at that time or not? A. I knew from my information that he had been a plainclothesman; that's why he was
497 called there.

Q. Now, Mr. Clarke, I show you People's Exhibit 2 and call your attention to the fact that the name "John Doe" appears on this waiver of immunity (handing to witness). A. That's right.

Q. John Doe is a fictitious person, is it not? A. Right.

Q. Did you explain to Mr. Regan as to who John Doe was at the time that he signed this waiver of immunity? A. Yes. Do you want me to explain that?

The Court: Yes, go ahead.

498

By Mr. Hellenbrand:

Q. Yes? A. I explained that this Grand Jury—the Grand Jury was different from the regular Grand Jury in the District Attorney's office. It was a special Grand Jury investigating the tie-in between racketeers, gamblers and law enforcement agencies in the County of Kings, and, therefore, it was investigating into these activities. That is the reason we called these various policemen who were plainclothesmen in the Police Department at that time to come down because

they would be questioned on their duties as plainclothesmen, and a John Doe investigation would be an investigation into the Police Department, say, in the plainclothes divisions.

Q. Now, did you call to Mr Regan's attention the fact that by reason of signing this waiver of immunity he does waive all immunity which he would have from indictment, prosecution, punishment, penalty or forfeiture? A. Within the scope of the Grand Jury investigation, yes.

Q. Now, Mr. Clarke, I call your attention to 500
this portion of the waiver of immunity: "or in any other investigation or other proceedings before any judge or court or tribunal." Did you call that portion of this waiver to Mr. Regan's attention?

Mr. Koota: That is objected to, if the Court pleases.

The Court: He may answer yes or no.

A. Yes, I did.

By Mr. Hellenbrand: 501

Q. You did call that to his attention? A. I did.

Q. Mr. Clarke, did you call to Mr. Regan's attention—I will withdraw that. Mr. Clarke, I call your attention to the fact that this waiver of immunity provides that "I do hereby waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding." Now, I ask you, did you call that to Mr.

Regan's attention? A. I called everything on this waiver to his attention.

Q. Now, did you explain that portion? A. I explained everything on the waiver to him. He read the waiver. He told me he understood it.

The Court: Who said he understood it?

The Witness: Regan, the defendant in this case. He even signed his own address here. The rest of the writing is in my handwriting.

By Mr. Hellenbrand:

Q. Did you ask him if he understood, Mr. Clarke, that if he signed this waiver of immunity, that it could be used even on a prosecution? A. I told him that anything he testified in the Grand Jury room could be used against him by the Grand Jurors or the District Attorney.

Q. No. I asked you a specific question as to whether or not you told him, when he signed this waiver, that if he were prosecuted, that the waiver would be effective even in the prosecution? A. Yes.

Q. Now, did you tell Mr. Regan, before he signed this waiver of immunity, that he had a right to get counsel? A. No, I didn't.

Q. Do you know if Mr. Regan had counsel present at the time that he signed this waiver of immunity?

The Court (To the jury): There is no law which says that you have to have a lawyer there. Is that plain English? Don't

you gentlemen go off on a tangent of that kind. There is no law which says that the waiver is no good unless there is a lawyer there. Of course, you must determine, on all the facts and circumstances, whether or not the man knew what he was doing when he was signing the waiver. That is submitted as a question of fact for the jury. Just because counsellor Hellenbrand asked a question, "Was the lawyer there?" and the D. A. says, "There was no lawyer 506
there," that in and of itself does not make that waiver void, because there is no law which says that in order for the waiver to be legal there has to be a lawyer there.

All right, proceed, please.

By Mr. Hellenbrand:

Q. What was the answer to that question? Did you say no? A. I didn't see any lawyer there; not his lawyer, anyway.

Q. Now, on January 5, 1953, Mr. Clarke, did I ask you this question, and did you make this 507
response:

"Q. Will you tell the Court in your own words what, if anything, you said to Mr. Regan before signed People's Exhibit 1 in evidence?"

Mr. Koota: That is objected to, if the Court pleases.

The Court: Sustained.

Mr. Hellenbrand: Exception.

The Court: You may ask him what was said. You have not shown that he is a

hostile witness. I will give you an opportunity to show that.

By Mr. Hellenbrand:

Q. Mr. Clarke, you say now that you told Mr. Regan that the waiver of immunity was effective not only before the Grand Jury but that it was likewise effective before any trial or any prosecution; is that correct? A. That the testimony he gave before the Grand Jury could be used
509 against him at any trial or the basis for an indictment.

Q. Now, I asked you if you called to Mr. Regan's attention the fact that this waiver was also a waiver of any privileges which he would have upon any criminal investigation or prosecution arising out of this investigation or this waiver, did I not?

Mr. Koota: I object to that question.

The Court: Sustained. You may ask him the question.

510 Mr. Hellenbrand: Exception.

By Mr. Hellenbrand:

Q. Now, did you tell Mr. Regan that if he signed this waiver of immunity, he waived all his rights even on a trial or a prosecution? A. No. I told him that anything—by signing the waiver and going into the Grand Jury, any of the testimony that he gave in the Grand Jury could be used against him at any time.

Q. Yes. Now, taking you one step further, I want to know if you told him that if he signed

this waiver of immunity, that he waived his privileges which he would otherwise have upon the evidence there given upon any criminal investigation or prosecution? A. I can answer it this way, and say that the testimony—any testimony he gave in the Grand Jury could be used against him even on a trial.

Q. Did you tell him that that testimony could also be used against him even before any other tribunal of the State? A. It could be used at any time against him. 512

Q. Anywhere? A. That's right.

Q. And you say you told that to him; is that correct? A. I certainly did.

Q. Well, on January 5, 1953, I asked you a question as to what you told Mr. Regan at that time; is that correct? A. That's right.

Q. And did you make this statement—

> Mr. Koota: No. I object to that, if the Court pleases, at this time.
>
> The Court: Well, I suppose now that Mr. Clarke has testified directly, Mr. Hellenbrand has the right to confront Mr. Clarke with sworn testimony that he gave, under the provisions of Section 8A of the Code of Criminal Procedure. 513
>
> Mr. Koota: Very well, your Honor.
>
> The Court: Objection overruled.

By Mr. Hellenbrand:

Q. "A. Well, I showed him a piece of paper similar to this which had the same form of this, which is a waiver of immunity and stated to him, 'This is a waiver of immunity,' I said, 'which

514 *Gerald V. Clarke—for Defendant—Direct*

means in practical language, so long as you are not a lawyer, that anything that you testify in the Grand Jury or any statements you give could be used against you. On the basis of this information, if it spells out a crime, you could possibly be indicted for it.' I said, 'If you do not sign this waiver of immunity and if you are put into the Grand Jury then by the District Attorney, anything you testify could not be used against you.' I said, 'Under the Penal Law and under
515 the City Charter, being you are a city employee, the same as I am or the same as anybody else in the Department of Sanitation or Fire Department, you are requested, if the District Attorney sees fit, to sign such a waiver and to testify before the Grand Jury. Now,' I said, 'We are not forcing you to sign this waiver if you don't want to sign it. In your case we will report the fact to the Police Commissioner, and if we report the fact to the Police Commissioner that you refused to sign a waiver of immunity and testify before the Grand Jury, in that case you will possibly lose your job, because under the City Charter
516 you have to sign such a waiver.' I also told him that this testimony could be used during the life of the Grand Jury by the District Attorney or by the Grand Jurors themselves." You did not at that time say, did you—

The Court: No.

Mr. Koota: I object to that.

The Court: Just ask him if he said that.

By Mr. Hellenbrand:

Q. Did you say that? A. I did.

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Mr. Hellenbrand: All right.

Mr. Koota: No cross.

Mr. Hellenbrand: We rest, if your Honor pleases.

If your Honor please, on the whole of the case, I move to dismiss because the People have failed to make out a prima facie case to prove contempt of court beyond a reasonable doubt.

The Court: The motion is denied. 518

Mr. Hellenbrand: Exception.

(Mr. Hellenbrand summed up to the jury, on behalf of the defendant.)

(Mr. Koota summed to the jury, on behalf of the People, during the course of which the following ensued:)

Mr. Koota (continuing): He was in uniform, and intelligent enough to make the Police Commissioner's squad.

Mr. Hellenbrand: May I have this taken 519 down, if your Honor pleases?

The Court: Yes. Proceed.

Mr. Koota: He made the Police Commissioner's squad. Not only was he in the Division, which is the lowest form of Plainclothes activity; he went over the Division; he went over the Borough command even. He went over the Chief Inspector's plainclothes squad. He went up into the highest branch of the Police Department, the Police Commissioner's confidential squad, who was charged by law with rooting out this gambling. And that man stands here and

520 tells you that he didn't know what this was, that he needed poor Jerry Clarke to tell him what this paper was? That he needed Jerry Clarke to tell him he can get a lawyer? Do you mean to say that he didn't know he can get a lawyer? Did he have to tell him he could get a lawyer if he wanted one? This is an insult to your intelligence.

Now, what does this mean, gentlemen? Perhaps I don't read English; perhaps I 521 don't know what is going on in this world. He comes on before the Grand Jury on March 7, 1951, and he is asked this question by Mr. Clarke: "Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature on it?" He says, "Yes," and he himself wrote in his own address, Regan did, "And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

522 "Q. And do you fully understand the meaning of this waiver, explained to you by myself?"

Now, what did Mr. Regan say, this experienced vice cop? Did he say, "You didn't explain anything to me, Mr. Clarke. I don't know what you're talking about."? Did he say, "No, I don't understand what this means. Explain it to me now"? This is his answer:

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did."

Now, why did he sign this waiver? He signed this waiver because he knew that if he didn't sign it, he would lose his job in five minutes. He would be kicked off the force, and properly so. When a public official—I don't care who that public official is, if it is the Mayor of the City of New York who is called before the Grand Jury, and he is asked to testify about the 524
conduct of his office—and these vice cops, we are investigating to see if these men took graft and if they come into a Grand Jury and they say "I won't tell you, because if I do, it will incriminate me," they may have a right to say that, but they certainly have not a right to stay on in public office after that. If these men are innocent, they will tell you, "I didn't take any graft." They haven't got a right to refuse to testify in the Grand Jury and at the same time stay on in public office and be 525
paid salaries by you. So the law says, "Yes, we can't force you to sign this waiver, but we certainly won't keep you on our payroll any more." That is why this man signed this waiver of immunity.

Now, what happened here? He came in on March 7, 1951—and I am going to be very brief, gentlemen, because I do not want to insult your intelligence by any elaborate summation here. And he was asked—he was handed this questionnaire which is in evidence, a form of question-

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naire, not this very one, but you see these are mimeographed questionnaires and they have all kinds of questions: "Do you have any real estate?" "How much money have you got?" "What is your living expenses?" And so forth. Because, as I said to you in my opening, you don't take a man into the Grand Jury and expect him to say to you, "Sure, I've been taking graft from Joe Doakes and a lot of other bookmakers."
527 People just don't do these things, and we are not children in this investigation. So we ask a man to tell us about his finances, which we can check on. If a man tells us, "I pay $30 a month rent," we can find out if it is $30 or $500 a month rent.

So we give him this questionnaire and we ask him to return it to the Grand Jury on March 28th. On March 27th, gentlemen, March 27, 1951—this paper is in evidence (indicating)—a day before he is supposed to return this questionnaire, he resigns from the Police Department. Is this an
528 honest man you are dealing with? Do you think this man didn't understand what he was doing? He was getting $4,000 a year salary. If he was living on $4,000 a year, wouldn't it have been the simplest thing to fill out this questionnaire, hand it in to the Grand Jury, without making any fuss about it? He can fill out this questionnaire—

Mr. Hellenbrand: If your Honor please, I don't like to interrupt, but I think that is a highly prejudicial statement and affects a substantial right of my client, and

I ask for a mistrial, making this kind of statement that he was an honest man, he cannot fill out this questionnaire, as not on the issue, and that it is not fair comment on the evidence.

The Court: Wait a minute, Mr. Hellenbrand. He is not being tried here as to whether he is an honest man or not an honest man in the Police Department. He is being tried here solely on the question as to whether he had a right to refuse to 530 testify.

Mr. Hellenbrand: That is my point.

The Court: I am stressing that point in simple clear, unmistakable English.

You may proceed.

Mr. Hellenbrand: Will the record note my exception?

The Court: There is nothing to except to, because I am saying that you are right, that that is the issue in the case, whether or not he had a right to refuse to testify. There is no other issue in this case.

Mr. Koota: Now, gentlemen, the defense 531 is that he did not understand what he was doing when he signed this paper. What is his point, that he thought he was signing a promissory note, or something like that, or a mortgage of some kind?

Now, where is there any evidence in this case, where is there any evidence in this case, just think about it, that this defendant did not understand what he was signing, did not know what he was signing? The only evidence is the statement that he read to the Grand Jury on December

22, 1952, which statement was prepared by his lawyer. Mind you, he comes into the Grand Jury on March 7, 1951, he says, "I understand what this is about, I understand this waiver. You explained it to me." He come back on October 22nd, 1952 and he was given another questionnaire, because it's a year and a half has elapsed and he hasn't got the questionnaire that was given him in 1951 any more. On No-
533 vember 12th he comes back again and he says, "I need a little more time to fill out this questionnaire." Three times he appeared before the Grand Jury. Never once did he say, "I didn't understand what this waiver meant." But then he gets a lawyer, which he has a right to do. But did the District Attorney tell him to get a lawyer on December 22nd? He knew that himself. So then he gets a lawyer, and he comes in on December 22nd, and he suddenly realizes that he didn't understand what this
534 waiver of immunity meant.

Now, gentlemen, let us reason this thing out. This defendant found himself in a quandary. The only way out for him was to refuse to testify and take his chances with this jury. And why? What was the question asked of him? We didn't pussyfoot around with him; we didn't trick him into anything. We asked him up and down, "Mister, when you were on the plainclothes force, did you take graft from a bookmaker?" Of course, he could have said, "No," without raising all this hullaballoo, if he could have said that truthfully. Here

is the position he was in, and this is on the question of his criminal contempt, that Mr. Hellenbrand said he had no criminal contempt. This is the position this man was in: If he answered the truth, if it was the truth, "Yes, I took bribes from a bookmaker," having signed this waiver of immunity, he could be prosecuted for it. On the other hand, if he said, "No," and that wasn't the truth, he could be prosecuted for perjury—both bribery, accepting bribes 536
from bookmakers, and perjury, which are very serious felonies. The crime for which he stands indicted here is a misdemeanor. So he was confronted with this alternative: If he answers "Yes, I took a bribe," he is going to be prosecuted for bribery. If he says, "No," and it is not the truth, he is going to be prosecuted for perjury. If he said, "No," and it was the truth, then it was the simplest thing for him to say "No, I never took a bribe." So what could he do? He could not answer that 537
question. This is on December 22nd. He has to stand mute, he has to refuse to answer and take his chances. But he cannot just come into a court; he's got to try to win the case, if he can. He can't just come in to you gentlemen and insult your intelligence to this extent, by saying to you, "I just don't want to talk, and that's all. You can't do anything." He has to come up with some reason. So, what is the easiest reason to think of: "I didn't understand this paper; I didn't know what I was signing when I signed this paper."

538 It wasn't until he got his lawyer on December 22nd that that happened, that he gave that excuse. Not until he got his lawyer on December 22nd, a year and a half, almost two years later. He appeared before the Grand Jury three times. Never once did he say, "I didn't know what I was signing; I didn't know that this was a waiver of immunity; I didn't know what it meant." When he gets his lawyer, before he goes into the Grand Jury on December 22nd, the lawyer knows the question: "Did you take bribes?" They know what the consequences are if he answers it "Yes" or he answers it "No." So the simplest thing is not to answer it at all, and then come before a trial jury. He knows he's going to be indicted for criminal contempt, and then come before a criminal jury and try to pull the wool over the eyes of some jury. They are coming up with some excuse. That is all that is being done here.

539

540 Now, he talks about there was no criminal intent here. Now, when he refused to testify on December 22nd, 1952, gentlemen, did we indict him right on the spot and rush him into jail? We were as fair with him as we possibly could. We didn't want to indict him for this criminal contempt. He forced us to do that. We could have indicted him on December 22nd, when he sat in that Grand Jury and he said, "I won't answer that question." We could have indicted him on the spot, if that is what the Grand Jury was after. But, no;

we brought him up before Judge Leibowitz and we asked Judge Leibowitz to explain to this man whether he has a right to refuse to testify. And the evidence shows that Judge Leibowitz conducted a hearing and Judge Leibowitz ruled that this waiver was effective, it was a binding waiver, and he said to this man, "Go down and answer these questions before the Grand Jury."

Now, his lawyer said to you on his summation that this man didn't know what his 542
rights were. What do you mean, he didn't know what his rights were? He was represented on December 22nd before Judge Leibowitz by Mr. Hellenbrand. Judge Leibowitz explained to him his rights. He said, "This is a good waiver. You go down there and testify." He goes back in the Grand Jury and says, "I still refuse to testify." Why? Because Mr. Hellenbrand is the Court of Appeals, is bigger than Judge Leibowitz, and told him, "You don't have to testify."

543

The Court: Now, wait a minute.

Mr. Hellenbrand: That is objectionable, if your Honor please.

The Court: I interjected before you objected. Is that right?

Mr. Hellenbrand: Yes.

The Court: Now, I am interjecting without any suggestion from counsel. I would not pursue that line of argument, M.. Koota, if I were you. If you pursue it, I will declare a mistrial. Just refrain.

Mr. Koota: I am sorry. I will refrain.

The Court: Now, that is pretty forth-

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right language. The jury is not to substitute its own judgment for that of Judge Leibowitz, and I am going to tell that to them in simple English. My judgment is not binding on them at all in any shape, form or manner. It is not be considered by them on the question as to whether this man is guilty or innocent.

Mr. Koota: Now, there is one further fact—

545 The Court: Except that he was directed to appear. That may stand, of course, as part of the proof in the case.

All right.

Mr. Koota: There is no question in this case that he was directed by Judge Leibowitz to appear and that he was advised of his rights. So he cannot stand here and tell you that he didn't know what his rights were. He gave him every opportunity to answer. The Grand Jury is acting in good faith. They want to get the facts; they want to know whether cops, these vice cops

546 were receiving bribes. They want to get rid of these rotten apples in the Police Department. They are not looking to indict people for criminal contempt for refusing to talk; they want the facts, and we went to the extent of bringing him up before Judge Leibowitz, so Judge Leibowitz could advise him that he would have to testify. We gave him every opportunity in the world to testify. We could not possibly have been any fairer to him.

What did he do? He led us to believe all along that he was going to sign the ques-

tionnaire that was given to him. November 12th he comes in and says, "I want more time to fill out the questionnaire." He doesn't say, "I'm not going to do it."

Gentlemen, I am going to conclude now. This case is a very serious case. As I have explained to you at the outset, these vice cops must know where they stand. They must know that they cannot come in before a jury of intelligent, responsible businessmen of this community and pull the wool 548
over their eyes. If you for one minute believe that this vice cop, who was on the force for ten years, did not know what he was doing when he signed this paper, then acquit him, acquit him without any hesitation; let him out. I don't think that you will find that verdict, gentlemen. I don't think there is any question here that we proved that this defendant knew what he was signing, that he was signing a waiver of immunity, and there isn't any question about it, this vice cop.

I ask you not to let him pull the wool over 549
your eyes, gentlemen. Use your common sense; use your best judgment here.

I ask you to return a verdict of guilty of the crime as charged in the indictment.

Mr. Hellenbrand: I think that the constant reiteration by the District Attorney as to "vice cop," mentioned something like fifteen times now, has appealed to bias and prejudice and affects a substantial right of my client.

The Court: There is nothing odious about the words "vice cop." You have

heard the expression "traffic cop," have you not? You have heard the expression "motorcycle cop," or "foot patrol cop." There is nothing odious about the words "vice cop." Do not let any such notion be entertained by this jury.

Gentlemen, will you give your attention to the charge of the Court on the law.

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551 CHARGE OF THE COURT

(LEIBOWITZ, *J.*)

The Court: Gentlemen of the jury, we have before us a paper which is called an indictment, and I will read this indictment to you at once.

"County Court of the County of Kings, The People of the State of New York, Plaintiffs, against Michael J. Regan, Defendant.

"The Grand Jury of the County of Kings, by this indictment, accuse the defendant of
552 the crime of Criminal Contempt of Court, committed as follows:

"During the month of December, 1949, the Grand Jury, duly impanelled for said month in the County Court of Kings County, Part VI thereof, was engaged in a certain investigation and inquiry for the purpose, among other things, of investigating into the alleged activities of criminals, racketeers and gamblers within the County of Kings and every and all matters affecting and appertaining thereto; by various orders of this Court duly made and entered the said De-

cember, 1949, Grand Jury and the December, 1949, Part VI Term of said Court was successively and continually extended to the 30th day of June, 1953 to permit said Grand Jury to complete the investigation then and theretofore pending before that body.

"In furtherance of and within the scope of said investigation on, in and about the months of March, 1951, October, 1952, December, 1952 and January, 1953, said Grand Jury was conducting an inquiry to ascertain whether 554
any plainclothes police officers of the City of New York, of whatever rank, who were charged with the specific duty of enforcing the laws against gambling and vice, had received bribes from bookmakers and gamblers within the County of Kings; whether any of said police officers were protecting said bookmakers and gamblers within the County of Kings and for money or other consideration paid to said police were affording them immunity from detection, arrest and prosecution for violation of the laws against gambling and whether any of said police officers 555
had financial assets or income which he could not account for, from legitimate sources.

"In and prior to the month of March, 1951, Michael J. Regan, defendant herein, was a plainclothesman of the Police Department of the City of New York and during that period was assigned to duty with a squad attached to the office of the Police Commissioner of the City of New York and did perform services in that capacity.

"On the 7th day of March, 1951 defendant appeared as a witness before said Grand Jury

in the County of Kings. Said defendant was thereupon duly sworn to tell the truth, the whole truth and nothing but the truth by a member of said Grand Jury duly authorized by law to administer an oath, the same being an occasion in which an oath is required by law and may lawfully be administered.

"The examination of said defendant as a witness was thereafter adjourned and pursuant thereto defendant duly reappeared as
557 a witness before said Grand Jury on the 22nd of December, 1952, in the County of Kings.

"On the said 22nd day of December, 1952, on said occasion, the following legal and proper interrogatory was put to said defendant as such witness:

> "'Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers?'

558 Defendant wilfully and unlawfully refused to answer said interrogatory and to testify.

"Thereafter and on the 5th day of January, 1953, a judge duly presiding in the County Court of Kings County, upon application therefor duly made, directed said defendant to answer all legal and proper interrogatories propounded to him in the Grand Jury and to testify.

"Thereafter and on said 5th day of January, 1953, the following interrogatory was put to said defendant as such witness:

> "'Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police

Department of the City of New York did you receive any bribes from bookmakers?'

Said defendant further thereupon refused to answer said question and any further questions that would be put to him in said Grand Jury.

"The interrogatories propounded to said defendant before said Grand Jury and herein set forth were legal and proper in that said Grand Jury was investigating whether the 560
defendant had received and accepted bribes in the County of Kings from bookmakers and gamblers to permit said gamblers and bookmakers to continue their gambling activities without police interference and to afford said bookmakers and gamblers police protection; whether this defendant was in possession of money, income or other assets which represented the proceeds of bribes given to him by gamblers and bookmakers in the County of Kings.

"The refusal of said defendant, after having been duly sworn, to answer interroga- 561
tories, as in this indictment is set forth, was contumacious and unlawful and thereby the defendant committed a contempt of court.

"And so the Grand Jury aforesaid do say that the said defendant, Michael J. Regan, in the manner and form aforesaid did knowingly, wilfully and corruptly commit the crime of Criminal Contempt of Court against the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

(Signed) Miles F. McDonald,
District Attorney, Kings County."

562 *Charge of the Court*

Gentlemen of the jury, what is a criminal contempt of court? The crime is defined in the following words:

> "A person who commits a contempt of court of any one of the following kinds is guilty of a misdemeanor."

Then there ensues a recital of several kinds of contempt.

What we are concerned with is Section 6 of that statute, which says: "Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

563

I shall deal with the elements that go to make up that crime later during my discourse upon various features of the case as we proceed with this charge.

Gentlemen, this Grand Jury has filed a charge against this defendant accusing him of committing the crime of criminal contempt of court. I have read the charge. The charge is called an indictment.

564 This paper that I hold in my hand is the indictment. An indictment is merely a charge or accusation. It has no probative force; it is not evidence of guilt; it does not create even a suspicion of guilt. Under the law, this defendant is presumed to be innocent. That presumption of innocence attends him throughout the entire proceedings; it accompanies him into the jury room; it abides with him at all times until you shall have found, by your verdict, that the presumption has been overcome in the manner provided by law.

The burden of establishing the defendant's guilt rests upon the shoulders of the prosecution. Each

and every element of the crime charged must be proved by the prosecution. The defendant is at no time under any duty to establish his innocence or offer any evidence tending to establish his innocence. The burden remains with the prosecution at all times to prove each and every allegation of the crime charged as set forth in the indictment.

The prosecution is bound to adduce credible, reliable, trustworthy, accurate evidence, and, finally, the law says that unless the defendant's 566
guilt has been established beyond a reasonable doubt, the jury is under a mandatory duty to acquit. If after a full, careful, intelligent review of all of the evidence in the case, you are not satisfied of the defendant's guilt to a moral certainty, it is your duty to acquit him.

To prove a defendant beyond a reasonable doubt is synonymous, that is, it means the same thing as proving him guilty to a moral certainty. The People are bound to establish his guilt to a moral certainty. Examine this evidence from A to Z; bisect it and dissect it; the evidence adduced on direct as well as on cross examination, and 567
ask yourselves the following question:

(a) Is there any doubt in my mind that this defendant is guilty of this charge? If you answer the question in the negative, then his guilt has been established beyond a reasonable doubt, for if there is no doubt in your mind that he is guilty, then you need not concern yourselves with whether the doubt is reasonable. If there is no doubt, that settles it. On the other hand, if you have a doubt as to his guilt or as to some element that bears on guilt or as to some feature of the case that has some bearing upon guilt, either be-

568 *Charge of the Court*

cause of the evidence or the lack thereof, or the failure thereof, or fair inferences that may be drawn therefrom, you should ask yourselves the second question:

(b) Does that doubt arise out of the evidence in the case? If you answer that in the affirmative, then you should proceed to the third question:

(c) Is it a reasonable doubt; is it a doubt that can stand the test of logic and common sense? Does the doubt appeal to a sensible, reasonable
569 business man, a man who has had experience in life; or is it some fanciful, imaginary, ridiculous doubt that has no basis in reason? Is it something that is seized upon by a juror in order to avoid the doing of a disagreeable duty? In other words, that it is not a doubt founded on reason but founded on expediency.

If there is a doubt as to this man's guilt, if it arises out of the evidence in the case, if it has logic and common sense to support it, then it may well be said that under the law proof of guilt has not been established beyond a reasonable
570 doubt. I have emphasized again and again that the prosecution is in duty bound to establish the defendant's guilt beyond a reasonable doubt. The jury must hold the prosecutor to strict account in that regard. If he fails, an acquittal must follow as a matter of course. On the other hand, if you are satisfied, from all of the honest evidence in the case, evidence that is before you, that the defendant is guilty as charged in the indictment, and you are so satisfied, as I have said, beyond such reasonable doubt, it is your duty to convict him.

Let no man entertain the idea that a District Attorney must prove a defendant guilty beyond

all possible doubt or beyond every imaginable doubt or beyond every conceivable doubt or to a mathematical certainty. The law does not require that. If the law ever required such proof, you could never get a conviction in any case, in any courtroom, in any State. Now, just sit back for a moment, gentlemen, and ponder what I have said. Whenever you have to decide a case on the testimony of human beings, there is always a possibility of doubt. I daresay there is hardly a case that comes into a criminal court where a juror, 572
a sensible juror, cannot, with proper justification, stand up in the jury room and say, "Well, there is a possibility the defendant may be innocent." We are not concerned with possibilities. That is true in every case, that there is a possibility that the defendant may be innocent. Don't you gentlemen see, we have not yet reached that era where a machine has been invented, which machine has the approval of our legislature and our higher courts, which machine can be hooked onto an accused, a plunger pushed, and then behind a little glass window there would be registered 573
"Guilty" or "Not guilty." When we reach that millenium, then the law will be changed and the law will say "You have to prove the man guilty to an absolute, mathematical certainty before you can convict him." But we have no such machine handy at the present moment. All that you can expect, in common sense, is that the District Attorney prove the defendant guilty beyond a reasonable doubt, but not beyond every possible doubt. I am elaborating upon the subject of reasonable doubt because I want you men to understand clearly what the law demands, and, at the same time, when the law does not demand. You

574 *Charge of the Court*

must distinguish between proving a man guilty beyond a reasonable doubt and proving him guilty beyond all possible doubt, and all imaginable doubt. Again I say, in the simplest terms, and with every force at my command, that you must hold the prosecutor to strict account, that he must establish the guilt of the defendant beyond a reasonable doubt. If he fails, he must be acquitted. On the other hand, if the prosecutor has proven him guilty beyond a reasonable doubt, he should be convicted.

575 Gentlemen, we function here under the law. No man is above the law. When I say "No man," I mean exactly that. The chief executive of our nation, President Eisenhower, is not above the law. The Governor of our great State, Governor Dewey, is not above the law. The chief executive of our City, Mayor Impellitteri, is not above the law. The humble citizen who dwells within this great State of ours is not above the law. We are a community of law and order. We live under the law; the law protects us in the enjoyment of our rights and our privileges. Thank God that it is

576 so, that we are not living in some Godforsaken, benighted land in this world where human beings are like dust that is caught up in the whirlpool on a windy corner and cast here and there; where the very lives of human beings are subject to the whims and the caprices of some rotten dictator or despot. We live here under the law, and just as long as you can I am all of us will preserve the law and give it life and vitality and enforce it, just so long will we have democracy, will we have this paradise on earth that we call America. This is a tribunal which functions under the law. The judge is not a law unto himself. Neither is the

District Attorney, nor defense counsel, nor the defendant, nor any other citizen. I have certain duties to perform, to which I shall now refer. These duties are outlined and defined by the law. I am not a law unto myself, although I wear the robe of my office. Neither are you laws unto yourselves. You are in duty bound to accept the law as I give it to you, because I am chargeable with the duty of explaining the law to you.

No juror, if he is a decent citizen, would even entertain the idea of going into a jury room and 578
there, behind a closed door, set himself up as a one-man legislature, and there arbitrarily twist or bend or amend the law to suit his fancy as to what he thinks the law ought to be. A decent citizen does not do that. A decent citizen accepts the law as laid down by the Court. The Court is supreme upon all matters of law.

You noted during the course of this trial, conducted very brilliantly by counsel on both sides, both very fine lawyers of the highest order and integrity, that they turned to me for rulings upon objections made to certain questions that were 579
put to witnesses. When they made these objections, certain propositions of law were involved, and I was required to rule upon these propositions. They did not look to you, the jurors, for such rulings. They looked to me, the Court; because the Court is chargeable with administering the law that pertains to the case.

I found it necessary to deny counsel's motions to dismiss the indictment. By that motion counsel asked me to "throw out the case," as they say in the vernacular, to take it away from the jury, to discharge the defendant without submitting the case to the jury. I refused to do that. I

did so advisedly. I refused to dismiss the indictment because I ruled that there were certain questions in the case that had to be passed upon by a jury. I did not determine that the man is innocent; I did not determine the man's innocence or guilt by such ruling, nor did I express any opinion concerning his guilt or innocence. I have no right to express such an opinion. I have not expressed any such opinion during the course of the trial, either directly, covertly, or otherwise.
581 If any juror has any notion that I have expressed any opinion concerning the guilt or innocence of the defendant, it is his duty to disabuse his mind of such notion and not let it play any part in his deliberation upon the guilt or innocence of the defendant.

The fact that I ordered this man to testify before the Grand Jury, which order was made in a proper proceeding before me, should not be considered by you in the slightest degree upon the vital questions in this case. I make that as clear as I possibly can. The fact that I said that the waiver was effective; that I said that the waiver
582 was properly executed; that it was binding upon the defendant; is not to be considered by this jury in the lightest degree in their determination upon that particular issue, or any other issue. I cannot make it any more plain, more clear than that, can I? It is simple English; it is forthright; it is plain. If any juror does not quite understand what I have said, I invite him now to raise his hand and I will make it more plain, if that is possible.

The jurors must be free and footloose in determining every issue in the case, because when a trial is had before a jury, the jury is the sole and

exclusive judge of the facts in the case. That is one of the issues of fact in this case.

Gentlemen, you already understand that you are the sole and exclusive judges of the facts. You, and you alone, determine the credibility of the witnesses and the force and effect of their testimony. In that regard you are supreme. You have the right to set up your own standards as to how you should judge a witness as to his credibility; but here are some things that you should bear in mind: You may take into account the 584
appearance of the witness, his demeanor, his manner of testifying, in judging as to his credibility. You may take into account the interest of the witness in judging as to his credibility. If you find that a witness is an interested witness, you may consider such interest in judging as to his credibility. If you should find that any witness has wilfully testified falsely as to a material fact in the case, you are at liberty to disregard his entire testimony. On the other hand, you are not bound so to do. You may accept that part of his testimony that you find to be true and discard 585
that which you find to be false.

Gentlemen, I am about to make some reference to the testimony in this case. I do so with the hope that I might be able to help you in understanding some of the issues in the case and the application of the law to these issues. I am not charging you the facts. The facts you must decide. I am merely referring to the evidence. As to whether the evidence does or does not establish certain facts is for you to determine. I am not expressing any opinion as to the credibility of the witnesses or the force and effect of their testimony. That is solely within your province.

586 *Charge of the Court*

What do we have here? We have here testimony by witnesses, and, in addition thereto, we have testimony concerning agreements or concessions or stipulations made by and between the respective parties to this action. Their spokesmen were Assistant District Attorney Koota, and Attorney Hellenbrand, representing the defendant. In addition to that we have some documentary or physical proof.

Let us now direct our attention to a cursory
587 examination of some of the testimony in the case. In behalf of the prosecution, the first witness who testified was Mr. Julius C. Koch. He was the man who came here from the Police Department with the records to show where Mr. Regan was employed in the Police Department, at what particular, given time. I believe the card is in evidence here, and you can have access to it under proper circumstances.

The next witness to testify was Mr. Pincus Weinschenker. Mr. Weinschenker is a clerk employed in this court, and through the courtesy, for which I am deeply grateful to counsel on both
588 sides, we cut Mr. Weinschenker's testimony down by maybe three or four hours, because counsel cooperated by entering into a stipulation. What was that stipulation in substance? They agreed that this Grand Jury, so-called Rackets Grand Jury, as it is known, but an ordinary Grand Jury in fact, except that its term is extended so that its work would be completed, entered upon an investigation of, in essence, the alleged tie-up between crooked policemen and professional gamblers here in Brooklyn, whereby they were trying to ascertain whether these gamblers were permittd to operate with immunity in our town here

because they were paying graft to the so-called plainclothesmen, whose duty it was to enforce the law and lock them up, prosecute them. That is what the Grand Jury was trying to find out, and counsel agreed that that is exactly what it was.

You had this Grand Jury, which started in in December, 1949, and by various orders which were signed by me, its life was extended from time to time; that they are now still operating as the so-called Rackets Grand Jury; that they are still working on this matter.

590

Through the testimony of Raymon H. Chadeayne, and the stenographic records that were admitted in evidence; Mr. Sidney Strimpel, the gentleman who is reporting the charge, who sits here to my left; Mr. John J. Braff, a stenographer; Mr. Richard Alleyne, a notary public; the following alleged—I emphasize the word "alleged" facts were established: On March 2nd, 1951, the defendant, pursuant to a subpoena, was caused to attend on the fourth floor of this building, at the quarters and the adjoining rooms occupied by the Grand Jury investigating this matter. Through the testimony of Mr. Clarke, which testimony was adduced here, by the way, by the defendant, it is claimed that this defendant was present in an anteroom adjoining the Grand Jury room, a side room or conference room, call it what you like. The dimensions of the room were given to you; that he was one of a group of officers there present; that Mr. Clarke read off or explained or detailed the substance or even the language of the so-called waiver of immunity. I do not recollect just exactly what the testimony was on that point. Your own recollection will govern in this and every other matter before you.

591

592 *Charge of the Court*

Mr. Clarke told us that he asked this defendant if he knew what this was all about, whether he understood. The defendant said "Yes," he understood; that he, as well as all the other officers, signed this so-called waiver of immunity. The claim is that he then was brought into the Grand Jury room and he was put on the stand before being sworn; he was asked if he had signed this waiver of immunity before the Notary Public; he said he did. He was asked specifically did he
593 know and understand what this waiver of immunity meant, did he understand it. He said yes. He was then sworn and he was handed the so-called blank questionnaire and told to fill it out and return with it in proper form, return with that questionnaire. Then the matter went on until October 22, 1952, when, if my memory serves me correctly, he was given another questionnaire and told to fill it out; that he returned on November 12, 1952 and said that he needed more time. The District Attorney and/or the Grand Jury or both said "Very well. We will give you until December 22nd, 1952, to fill out this question-
594 naire."

On December 22, 1952, he came in and the questionnaire was not filled out, and the specific question was put to him, in words or substance: "Did you take any graft from bookmakers in Brooklyn?" He said, "I refuse to answer." Why did he refuse to answer? He had a statement all written out, it is claimed, wherein, in words or substance, he said, "I refuse to answer because the waiver of immunity which I signed was signed under a misapprehension. I didn't know what it was all about; I didn't understand it. It wasn't explained to me, and, therefore, the waiver I

signed is absolutely worthless. It wasn't a voluntary, conscious, intelligent act on my part."

When the man refused to testify, the next order of business was to bring him before the judge. So they left the fourth floor and they came up here to the sixth floor, into this courtroom, and then I put the matter over until January 5th of this year, and I conducted a hearing on that question. I thereupon directed this man to go down to the Grand Jury room and to testify, to answer proper questions. He went down there and he 596
refused to testify. He "stood pat," as they say in the vernacular. Thereupon, the Grand Jury indicted him for criminal contempt of court.

The issue has been clarified in this case through the talents of these fine lawyers before this Court. When a man signs something, he must know what he is signing. Otherwise, the signature is ineffectual. He must have a conscious understanding of what he is signing. The People are in duty bound, on all of the facts and circumstances, to establish that this defendant knew full well what he was signing when he signed the waiver; that
he knew full well the implications involved in 597
signing this waiver. Gentlemen, you have to use your common sense, your intelligence. You have a right to take into account who and what this man was, in determining whether or not he knew what he was doing when he put his signature to this waiver. Certainly, you have a right to take that into account, whether or not this was some ignorant person, unfamiliar with our ways and courts, or was it, on the other hand, a person who could be reasonably expected to know what this was all about? I am not venturing any opinion on it; I am putting the question in an inter-

rogatory form, and not in a rhetorical sense. Please do not misunderstand me. I say specifically to you that you have a right to consider who and what the individual was, with whom are we dealing here? That is common sense, is it not?

The fact that this man was a police officer is not conclusive upon that subject against him. It is something that may be taken by the jury into consideration, and the jury can give it such
599 weight as it deems proper under the circumstances. Concededly, he was taken before the Grand Jury and he said, "I know what is in this paper." He was asked that question. He said, "I know what it is." Mr. Clarke says, "Did I explain it to you?" The defendant allegedly said, "Yes, you did," in words or substance. Of course, that is not conclusive by any means against him; but you may consider that evidence in deciding the question as to whether he in fact did not know what it was all about, whether he signed the waiver knowing full well what it meant.

It is argued here that no complaint was ever
600 made by him until a year and a half later, namely, in December of 1952. It was claimed that then for the first time he ever challenged the efficacy of this waiver of immunity. It is for you to say whether or not he knew what he was signing and knew the full import of what he was signing. That seems to be the "bone of contention," the issue in this case. It is very strenuously contested by both sides.

If an effective waiver was signed by him, if he knew full well what he was doing when he went into that Grand Jury room in March of 1951, that waiver was good for all time thereafter. Is that

simple English, Mr. Foreman and gentlemen? He did not have to be asked to sign a waiver each time he appeared before the Grand Jury, just as long as the life of that Grand Jury continued and they were "attending to their knitting," as set forth in the order of the Court, that waiver was effective. That should settle the point in your mind that may arise in your discussion in the jury room. Once the waiver is signed, provided it is an effective waiver, that waiver continues during the life of that Grand Jury. If the 602
waiver was effective in March of 1951; if he knew what he was doing when he signed that waiver and also if he knew the import of it, as it is claimed by the prosecution in this case, if you are so satisfied beyond a reasonable doubt, he had no right to refuse to testify in December of 1952. That is clear, simple English, too, is it not? Of course, if you are not satisfied that the man knew what he was doing, if you are not satisfied that he knew the import of that waiver on March 7, 1951, he had a right to refuse on December 22, 1952, to give testimony which might incriminate 603
him. That is simple English, too. So it all boils down to this: Did he know what he was doing on March 7, 1951? Did he know the import of the waiver? Did he know what it meant; what the consequences were when he put his name to that paper, which it is conceded he did?

This defendant has no right to set himself up as a court of appeals. He cannot say, "Well, now, I don't agree with you, Judge," or "I don't agree with you, statute." If he wilfully and contumaciously and unlawfully refuses to testify, that is, to answer legal and proper interrogatories before the Grand Jury after being sworn, he is guilty

of a contempt of court. He is not guilty of a contempt of the Grand Jury; he is guilty of the contempt of court, because I ordered him to testify. He is guilty of the contempt of court and not of contempt of the Grand Jury.

As to whether I had a right to order him to testify is submitted to you as a question of fact, and that question of fact is, did he execute an effective, lawful waiver, with full knowledge of the import thereof and the terms thereof? If he
605 executed that waiver under such circumstances as I have described, namely, with the full knowledge of the contents thereof and the import thereof and thereafter wilfully refused to testify to a question which was conceded by both sides to be a proper question, and you are so satisfied beyond a reasonable doubt, you will convict this defendant as charged in the indictment. On the other hand, if you are not so satisfied, in other words, if you are not satisfied of his guilt of every element of the crime charged beyond a reasonable doubt, you will acquit him.

Again you come to the question as to whether
606 the execution of the waiver was voluntarily made, was voluntary, and whether it was based on an intelligent appreciation of the significance thereof by this defendant. The People are bound to prove that the waiver was voluntary, voluntarily made and with knowledge of its import on the part of the defendant. You must determine whether or not the People have satisfied you beyond a reasonable doubt, after a full and fair and careful examination of all of the evidence in the case.

The defendant did not take the witness stand here and testify. The defendant had a right to

take this witness stand and testify in your presence, but his refusal or neglect or failure to testify does not and must not create any unfavorable inference against him.

Gentlemen, that is about all the law that you need in order to decide the issues in this case. I might state these propositions of law in various forms and in different verbiage, but it would not add one single iota or tittle to the charge that would be of any benefit to you. If I have overlooked anything inadvertently, I know it will be 608
called to my attention by the learned counsel on both sides.

This is an important case. It is a case of great importance. Yes, it took only a short time to try it, but it is a case of great importance. Every criminal case is a case of great importance. No man has a right, in violation of the law, to refuse to testify before a Grand Jury, and no one has a right to violate any constitutional or other rights belonging to a prospective witness. If we permitted people, contumaciously and wilfully and wrongfully and unlawfully, to refuse to testify, we might as well close the doors to our temples 609
of justice, to our Grand Jury rooms. At the same time, the rights of the individual are sacred. Regardless of the expediency of the moment or the desire to accomplish a beneficial result, a laudable result, the rights of the individual are sacred and must be zealously safeguarded and protected.

This is an important case to the People of the State of New York, of whom this defendant is a part. It is important that the law be upheld. I suppose all of us understand that these kids over in Korea are dying and shedding their blood

in order to preserve our way of life, our existence under the law. I call upon these twelve citizens in this jury box to uphold the law, the law which protects a defendant in certain respects. I call these matters to your attention: presumption of innocence, burden of proof, reasonable doubt; and the law which holds him responsible if he has committed a crime. All I am asking you to do is to uphold the law. I am not asking for any particular verdict. The indictment does not
611 ask for any particular verdict. The People of the State of New York, as plaintiffs, are asking you to uphold the law, all of the law that pertains to the case.

This is an important case to the defendant. This is his day in court. He has the right to demand and to receive from this jury fair, even-handed justice, without prejudice, without bias being cast in the scales of justice against him. He has a right to that, and I am charging you to accord him the benefit of such right. That is all that he is entitled to, nothing more. He is not entitled to sympathy; he is not entitled to what
612 we commonly call a "break," which means a favor or some privilege given to him by a jury. He is not entitled to that. He is entitled to his day in court. He is entitled to justice, even-handed justice. Yes, we want him to be warranted in feeling down deep in his heart, when he leaves this courtroom, whether your verdict is for him or against him, that he has received a fair, square trial, in the best traditions of American justice. At the same time, we want this prosecutor also to be warranted in feeling that his side of the case has received fair, impartial and honest consideration at your hands. You cannot be biased

in favor of one side without being unfair to the other. You just hold the scales of justice evenly, just as the Goddess of Justice, on the roofs of our courthouses, from one end of the country to the other, holds those scales evenly. You note the blindfold that she wears. That is so because she does not recognize any distinction between race or color, between creed or religion. We do not ask this man whether he is a Jew or whether he is a Christian; we do not ask him whether he is a Protestant or a Catholic; we do not ask him 614
even whether he is an atheist or an agnostic. Before this bar of justice, all men are equal and all men receive justice regardless who they are, what station in life they occupy or what their prior history has been. I am asking you to do justice in this case. Be men; stand on your feet; "call a spade a spade." Come back with a verdict that speaks the truth. A just verdict is a true verdict, and a true verdict is based upon the truth. What is the truth in this case? That is for you to say.

There is only one of two verdicts that you can render in this case. You may find the defendant 615
not guilty, or, find him guilty as charged in the indictment.

Are there any exceptions?

Mr. Hellenbrand: Yes.

The Court: Come up here, please.

(The following occurred at the bench, not within the hearing of the jury:)

Mr. Hellenbrand: I except to so much of your Honor's charge as to whether or not defendant was familiar with the courts, in view of the fact that there is no proof that he was familiar with the courts.

The Court (To the jury): Gentlemen, there has been an exception here where the lawyer says that there is no proof here that the defendant was familiar with courts. Strike that out from your consideration. You may consider the fact that he was a vice cop for ten years, and that his duties have been explained to you by the witnesses.

Very well; next exception.

Mr. Hellenbrand (en banc): I except to so
617 much of your Honor's charge that it all boils down to whether the waiver was effective, because the question still remains as to whether the contumacious refusal was a criminal contempt.

The Court (To the jury): Yes. Counsel has pointed out that I said that it all boils down to whether or not the waiver was effective. I charge you gentlemen that, of course, the issue in the case is whether or not the refusal to testify was contumacious and unlawful, as defined by the law.

That takes care of that exception.

Mr. Hellenbrand (en banc): I except to so
618 much of your Honor's charge as the Court instructs the jury to be men and call a spade a spade.

The Court: Yes. You can have that exception.

Mr. Hellenbrand: I except to so much of your Honor's charge—and this was in the sentence: "That if men refuse to testify, the Court will close its doors."

The Court (To the jury): When I said, gentlemen, that if men refused to testify before the Grand Jury, we could close our doors, that means if they refuse to testify in violation of the law. I add that to the charge.

Go ahead, please. Of course, if a man has a legal right to refuse to testify, if he has that right, no crime has been committed.

Mr. Hellenbrand (en banc): That is all the exceptions. Now requests.

I ask your Honor to charge this jury that the word "unlawful," under Section 600 of the Penal Law, means being contrary to or in violation of law and means something more than a voluntary act. It means that the intentional act is in fact wrongful and done for a wrongful purpose. 620

The Court: No, not the last part.

Mr. Hellenbrand: Exception.

The Court (To the jury): Gentlemen, I have been requested, and do charge, that the word "unlawful" means being contrary to or in violation of law, and it means something more than a voluntary act. It means that the intentional act is in fact wrongful and in violation of law.

I refuse to charge concerning the purpose of the defendant.

The intent must be to refuse to abide by the law. As to what his reasons were or what his purpose was is not a defense. It may be considered by the jury on the question as to whether there was an intentional refusal, of course. 621

Mr. Hellenbrand (en banc): May I have an exception to that?

The Court: Yes, you may have an exception.

Mr. Hellenbrand: I ask your Honor to charge No. 6 in my requests: The fact that the defendant claims his waiver was ineffective and his status as a witness was in doubt, should be considered by the jury in determining whether his refusal was contumacious and unlawful.

The Court: What does that mean? It means that if he is not certain as to the law, that may be considered by the jury? Is that the purpose of the request? I do not understand it.

Mr. Hellenbrand: No. The purpose of the request is that if this man is honestly mistaken--

The Court: You mean after I told him to testify, if he still said that he believed that he was right and I was wrong?

Mr. Hellenbrand: Yes.

The Court: That would excuse him?

623 Mr. Hellenbrand: Yes, your Honor. It bears on the intent as to whether—

The Court: Intent as to what?

Mr. Hellenbrand: Intent as to whether he wanted to commit the crime of criminal contempt.

Mr. Koota: I am absolutely opposed to that. Otherwise, it would follow that every time a question is asked of a witness in the Grand Jury, he refuses to answer, he is taken before the Court, the Court directs him to answer, he still does not have to answer, on that theory, until the Court of Appeals passes on the particular ques-

624 tion, which is preposterous. He has a right to an instruction by the Court, but beyond that he acts at his peril. Once the Court instructs him to answer, then he takes his chances.

The Court: I agree with Assistant District Attorney Koota. It is not only the law, but common sense.

You have an exception.

Mr. Hellenbrand: Exception.

I ask your Honor to charge No. 7, which I think you charged in part, that the People must prove beyond a reasonable doubt that the waiver was

effective, and if the jury find that there is reasonable doubt as to the effectiveness of the waiver or that the waiver was not executed as the People claim, the jury must find the witness was not contumacious, and, therefore, not guilty of contempt of court.

The Court: I have already charged it in substance, have I not?

Mr. Koota: I think you have, your Honor.

The Court: All right. Denied.

Mr. Koota: That is, your Honor denies it in 626
those words.

The Court: I have already charged it; I have covered it. I refuse to repeat it.

Anything else?

Mr. Hellenbrand: Yes. No. 10. The witness can waive his constitutional privilege only if it appears that he was made aware of its existence and the surrounding safeguards, and voluntarily and intelligently made the waiver.

The Court: No. The words "made a waiver" are what I object to. I will charge that if he was aware of its existence.

627

(To the jury): Gentlemen, I have been requested and do charge that the witness can waive his constitutional privileges only if it appears that he was aware of its existence and the surrounding safeguards and voluntarily and intelligently made the waiver. I refuse to include the word "made".

Mr. Hellenbrand (en banc): May I have an exception.

The Court: You have an exception.

Mr. Hellenbrand: All right. No. 11, that there must be a conscientious effort on the part of the prosecuting officers to explain to this witness his

628 *Exceptions and Requests to Charge*

constitutional rights to refuse to sign the waiver as well as the meaning and significance of the waiver.

The Court: Denied.

Mr. Hellenbrand: May I have an exception, please?

No. 12, evidence that is as consistent with innocence as guilt is insufficient to sustain a conviction, and unless there is substantial evidence of facts which exclude every reasonable hypo-
629 thesis of guilt, they must return a verdict for the defendant.

The Court: Yes, I will charge that.

(To the jury): Gentlemen, I charge that evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence or facts which exclude every reasonable hypothesis of innocence, the jury must return a verdict for the defendant.

Mr. Koota (en banc): Of course, that rule applies only in circumstantial evidence cases.

The Court: Well, I will charge that directly
630 as requested.

Mr. Hellenbrand (en banc): No. 13, the latter part, your Honor has already charged about the presumption against him. Now I ask your Honor to charge that the failure on the part of the defendant to be a witness does not lessen the burden of the People in establishing the guilt or lessen the evidence which is necessary for a conviction.

The Court (to the jury): Gentlemen, I have been requested and do charge that the failure or refusal or neglect of the defendant to take the

witness stand and testify in his own behalf does not lessen the burden of the People in establishing his guilt or lessen the evidence necessary for conviction.

Mr. Hellenbrand (en banc): No. 14, the jury has a right, in determining the question of contempt, to take into consideration the state of mind of the defendant at the time he refused to answer, and also his intentions in so refusing.

The Court: Denied.

Mr. Hellenbrand: I respectfully except. 632

The Court: Except as already charged.

Mr. Hellenbrand: No. 15, is a very short one. The jury has the right to take into consideration what transpired before the Grand Jury.

The Court: Certainly.

Mr. Hellenbrand: In order to determine whether or not the refusal was contumacious.

The Court (to the jury): Gentlemen, I have been requested and do charge that you have the right to take into consideration what transpired before the Grand Jury in order to determine whether or not the refusal was contumacious. 633

Mr. Hellenbrand (en banc): Now 16, if your Honor please, I think your Honor charged in part.

I request you to charge even though the defendant stated before the Grand Jury that he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it.

The Court (to the jury): I have been requested to charge and do charge that even though the defendant stated before the Grand Jury that

he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it.

Mr. Hellenbrand (en banc): I ask your Honor to charge—just a portion of it—that the waiver of immunity, to be effective, can only be effective if there is proof of knowledge on the part of the witness that he had a right not to be compelled to execute such a waiver.

635 The Court (To the jury): Gentlemen, I have been requested to charge and do charge that the waiver, in order to be effective, it must be shown beyond a reasonable doubt that the defendant knew that he could not be compelled in advance to sign such a waiver.

Is that satisfactory?

Mr. Hellenbrand: That is satisfactory.

The Court: All right, gentlemen, I am going to send you out to lunch, the thirteen of you, and when you come back from lunch, the thirteenth juror will be discharged from further consideration of the case, but will remain in the courtroom

636 available in the event his services are necessary.

There is one last instruction that I forgot to give you, which I shall give you now. Please give me your attention.

Under no circumstances is any juror to consider the question of punishment in determining this defendant's guilt or innocence. Do not start a debate or a discussion about punishment, what is going to happen to him in the event you render one kind of verdict or another kind of verdict. That is no concern of yours. If any juror starts any discussion along that line, figuratively speak-

ing, take him by the lapel of his jacket and say, "Now, you remember Judge Leibowitz told us it was none of our business." It is none of your business; I say that most respectfully to you. It is no concern of yours what happens to him in the event your verdict is one kind or another. That is my concern; not yours. All I expect you to do is to come in with a verdict that speaks the truth, a verdict that is rendered without fear and without favor.

Gentlemen, you may retire and return, please, 638
at 2:15, when the twelve regular jurors will go into the jury room and the thirteenth juror will follow the instructions of the Court.

You may retire, gentlemen.

(Whereupon the jury retired.)

(The following occurred in the absence of the jury:)

STIPULATION:

It is stipulated by and between the attorneys for the respective parties hereto, that the jury may have any and all exhibits requested. 639

(Luncheon recess.)

AFTERNOON SESSION.

2:15 P.M.

(Jury returned; trial resumed.)

(The jury returned at 3:00 o'clock P.M. with a verdict as follows:)

The Clerk (Mr. Lehritter): Gentlemen of the jury, have you agreed upon a verdict? Rise, Mr. Foreman? How say you? Do you find the defen-

640 *Verdict—Motion to Set Aside Verdict*

dant at the bar guilty as charged, or not guilty?

The Foreman: Guilty as charged.

The Clerk: Hearken to your verdict as the court records it: You and each of you say you find the defendant at the bar guilty as charged, and so say you all?

The Foreman: Yes, sir.

Mr. Hellenbrand: If your Honor please, may I move at this time to set aside the verdict on the ground that it is against the weight of evi-
641 dence and against the law in the case?

The Court: Motion denied.

Mr. Hellenbrand: Exception.

(Defendant's pedigree taken.)

The Court: Remanded.

(Defendant remanded.)

(Jury discharged.)

642

643

Sentence

COUNTY COURT
OF THE COUNTY OF KINGS

PART I

THE PEOPLE OF THE STATE OF NEW YORK

—against—

644

MICHAEL J. REGAN,

Defendant.

Indictment No. 249/1953.

Brooklyn, N. Y.,
April 9, 1953.

Before:

HON. SAMUEL S. LEIBOWITZ,
County Judge.

645

Appearances:

Mr. Julius Helfand,
Assistant District Attorney,
for the People.

Mr. Julius S. Hellenbrand,
for the defendant.

Sidney Strimpel, C.S.R.
Official Reporter.

(The usual formal question on sentence was put to the defendant.)

Mr. Hellenbrand: If your please, your Honor has the probation report, and punishment by jail commitment is only part of the punishment which would be visited upon this defendant and his entire family.

My own investigation and information is that the personal family life and other characteristics of this man are beyond reproach, and if there is
647 an opportunity here for leniency in the sentence, in view of the unfortunate status of this defendant and his entire family, I should ask for it. This is the last thing that I can do for this man before your Honor.

Mr. Helfand: Your Honor please, this case was tried before your Honor and your Honor knows the facts. I don't think I need go into that.

I think the probation report will disclose the background of this defendant with respect to the financial investments that he and others in his group made in this sanitarium in Connecticut and
648 other places. This sentence, however, today impels me to say something which is in the news very much this morning. No one could pick up this morning's papers without being shocked and grieved by the recounting of the funeral services that were held yesterday for the two brave police officers, one a colored officer, who were killed in the line of duty in Harlem. Some of the tabloid papers carried pictures of the funeral services.

You read these things, and you know, as I know and as I have said so many times and as your Honor has said so many times from this bench, of the wonderful work that is done by

the great majority of the members of the Police Department of the City of New York and what a wonderful Police Department it is, as this shocking event of the death of these two brave officers brings home to us so vividly.

Then we read on another occasion that someone makes a speech somewhere and talks about morale of the Police Department, and then we appear here in this court and we see an officer brought here who was a former plainclothesman, who was part of the small group, the very small 650
group of venal cops who were grafting while they were in the Police Department. You see this great shading of difference of one type of police officer, of whom we are proud, and the other who stands before your Honor for sentence. I think whatever the limit sentence is here in the form of a prison sentence should be imposed in this case.

The Court: This is another former plainclothesman—and they are only a handful compared to the fine police force we have. I emphasize the word "handful", because that word is descriptive of the true number of crooks that are in the 651
Police Department. This is one of them.

As Assistant District Attorney Helfand has just pointed out, he has helped to blacken the name of this great New York City Police Department, whose deeds of heroism are publicized in the press almost daily. These police officers have to be penalized because of this handful of dishonest cops.

What is significant about a crook is this: You take a pickpocket. A pickpocket will steal a man's purse and then hide in the crowd. A man that sets fire to a house will stand in the crowd and watch the engines do their work. And so it is

with these crooked cops; they try to hide in the crowd, in the vast crowd of decent policemen and they try, with all of their might, to pull over their shoulders the shrouds of decency which they do not have. It is a handful, that is true, as the District Attorney has pointed out, but they do some awful damage, not only to the community, not only to law and order, but to the reputation of the other fine men.

After this man was appointed in 1942, he was
653 almost immediately made a plainclothesman. There were undoubtedly thousands of others more qualified, with longer years of service who deserved this assignment, but somehow or other Regan got the job. For nine years, up to 1951, he earned an average of about 3,000 a year; that is, $27,000 in all. During this time he bought a $20,000 home on Long Island in 1947, paying $12,500 cash. He put the house in his brother's name.

In 1951, this ordinary patrolman, this vice squad patrolman, invested $18,500 in cash in business
654 enterprises. His partner in these ventures, still owned by them; they still have the property; was James Breslin, another former plainclothesman, who was sentenced to the Penitentiary only the other day by Judge Joyce of our court on a charge similar to the defendant's. He, too, refused to answer the District Attorney's questionnaire concerning his income.

This defendant has spent at least $31,000 in cash over and above his salary. When it came time for him to fill out his questionnaire, Regan took it on the lam; he deserted the ranks of the Police Department and he fled to Florida. He was thereupon dropped from the force. While he

655

was hiding out in Florida, he had an apartment for which he paid $160 a month. A brother of this defendant, also a former plainclothesman named Daniel Regan, was named by the notorious Harry Gross as the recipient of graft, and following the recent departmental trials in Manhattan, Daniel Regan was fired from the force.

This defendant, Michael Regan, according to the probation report, has been on the payrolls of the bookies for years.

He is sentenced to the limit sentence of one year in the Penitentiary. 656

Defendant remanded.

657

658

Stipulation as to Exhibits

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

659 MICHAEL J. REGAN,

Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the following numbered and described exhibits, need not be printed or reproduced in the printed record on appeal, but that the originals thereof will be handed up by either party so desiring on the argument or submission of the appeal herein, with the same force and effect as
660 if incorporated in the printed record on appeal.

PEOPLE'S EXHIBITS

1. Force card of Michael J. Regan.
3. Form of financial questionnaire.

JULIUS A. HELLENBRAND
Attorney for Appellant

MILES F. McDONALD
District Attorney, Kings County
Attorney for Respondent

661

Affidavit of No Opinion

STATE OF NEW YORK, }
COUNTY OF QUEENS, } ss.:

JULIUS A. HELLENBRAND, being duly sworn, deposes and says:

I am the attorney for the appellant in this action, and I am familiar with all the proceedings herein.

That no opinion or memorandum was rendered by the Court below. 662

JULIUS A. HELLENBRAND

Sworn to before me this
28 day of May, 1953.

JOSEPH J. PASSELA
Notary Public, State of New York
Commission expires March 30, 1954

663

664

Clerk's Certificate

I, Francis J. Sinnott, Clerk of the County Court, Kings County, City and State of New York, do hereby certify that the foregoing record contains a record of the notice of appeal and the judgment roll in the case of the People of the State of New York against Michael J. Regan, now on file in the Clerk's office of said Court, and the same has been compared by me with the originals and are correct transcripts therefrom and of the whole of such originals.

665

Given under my hand and seal this 14 day of May, 1953.

Francis J. Sinnott
Clerk of Court

[Seal]

666

Order of Affirmance of Appellate Division 667

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 7th day of July, 1953.

Present:

Hon. Gerald Nolan,
Presiding Justice, 668
Hon. Frank F. Adel,
" John MacCrate,
" Frederick G. Schmidt,
" George J. Beldock,
Justices.

The People of the State of New York,
Respondent,

—v.—

Michael J. Regan,
Appellant. 669

Order on Appeal from Judgment of Conviction

The above named Michael J. Regan, the defendant in this action having appealed to the Appellate Division of the Supreme Court from a Judgment of the County Court of the County of Kings, rendered on the 9th day of April, 1953, convicting the defendant of the crime of criminal contempt of court, and sentencing him to the New York City Penitentiary for the term of one year, and

670 *Order of Affirmance of Appellate Division*

from each and every intermediary order, herein, and the said appeal having been argued by Mr. Julius A. Hellenbrand of Counsel for the appellant and argued by Mr. Aaron E. Koota, Assistant District Attorney, of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the judgment of conviction so appealed from be and the same
671 hereby is unanimously affirmed.

Enter:

John J. Callahan,
Clerk.

672

Judgment of the County Court 673

At a Term of the County Court, Kings County, held at the Courthouse thereof No. 120 Schermerhorn Street, Borough of Brooklyn, City of New York, on the 21st day of July, 1953.

Present:

HON. SAMUEL S. LEIBOWITZ,
County Judge. 674

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

MICHAEL J. REGAN,

Defendant.

A verdict of guilty of the crime of criminal contempt of court having been rendered against the 675
above named defendant on the 5th day of March, 1953, and thereafter judgment having been duly entered on the 9th day of April, 1953, sentencing him to be imprisoned in the New York City Penitentiary for a term of one year and said defendant thereafter and on the 16th day of April, 1953 having appealed from said judgment of conviction to the Supreme Court, Appellate Division, Second Judicial Department, and the said appeal having duly come on to be heard and the said Appellate Division having after due deliberation affirmed the judgment of conviction so

676 *Judgment of the County Court*

appealed from as appears by the remittitur dated July 7, 1953 and filed in the office of the Clerk of said Court on July 8, 1953.

Now, on reading and filing a certified copy of the said remittitur dated July 7, 1953, and on motion of Miles F. McDonald, District Attorney of the County of Kings, it is hereby

ORDERED that the judgment of the Supreme Court of the Appellate Division, Second Judicial
677 Department be and the same hereby is made the judgment of this Court.

ENTER

SAMUEL S. LEIBOWITZ
J. C. C.

Granted
Jul 21 1953
FRANCIS J. SINNOTT
Clerk

678

679

Certificate Granting Leave to Appeal to the Court of Appeals

COURT OF APPEALS
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

—against—

680

MICHAEL J. REGAN,

Defendant-Appellant.

I, CHARLES W. FROESSEL, Judge of the Court of Appeals, do hereby certify that in the record and proceedings herein, questions of law are involved which ought to be reviewed by the Court of Appeals.

Bail as previously provided is fixed pending appeal to the Court of Appeals in the sum of $5,000.00. 681

Dated: Jamaica, New York, N. Y.,
July 11, 1953.

CHARLES W. FROESSEL
Judge of the Court of Appeals

682 **Notice of Appeal to the Court of Appeals**

COUNTY COURT

County of Kings

Indictment No. 249/53

The People of the State of New York,

Respondents,

—against—

683

Michael J. Regan,

Defendant-Appellant.

Sirs:

Please take notice that pursuant to permission granted by order of Hon. Charles W. Froessel, Associate Judge of the Court of Appeals, made the 11th day of July, 1953, the defendant above named hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division, Second Judicial Department, made and entered on the 7th day of July, 1953, unanimously affirming the judgment of the County Court of Kings County, entered on the 5th day of March, 1953, convicting the defendant of the crime of criminal contempt of court and from each and every part of said order and judgment.

684

Dated: July 15, 1953

Notice of Appeal to the Court of Appeals 685

Yours, etc.

JULIUS A. HELLENBRAND
Attorney for Defendant-Appellant
Office & P. O. Address
161-19 Jamaica Avenue
Jamaica 32, New York

To:

HON. MILES F. McDONALD
District Attorney of Kings County
Municipal Building
Brooklyn, New York 686

CLERK OF THE COUNTY COURT
OF KINGS COUNTY
120 Schermerhorn Street
Brooklyn, New York

687

688

Affidavit of No Opinion by the Appellate Division

STATE OF NEW YORK, }
COUNTY OF QUEENS, } ss.:

JULIUS A. HELLENBRAND, being duly sworn, deposes and says:

I am the attorney for the appellant in this action, and I am familiar with all the proceedings herein.

689

That no opinion or memorandum was rendered by the Appellate Division in making the order of affirmance.

JULIUS A. HELLENBRAND

Sworn to before me this
26th day of August, 1953.

THOMAS J. MACKELL
Notary Public, State of New York
Commission expires March 31, 1954

690

Clerk's Certificate

691

I, Francis J. Sinnott, Clerk of the County Court, Kings County, City and State of New York, do hereby certify that the foregoing record contains the Order of Affirmance of the Appellate Division, Judgment of the County Court, Certificate Granting Leave to Appeal to the Court of Appeals, Notice of Appeal to the Court of Appeals and the Record on Appeal to the Appellate Division, Second Department in the case of the People of the State of New York against Michael J. Regan, now on file in the 692
Clerk's office of said Court, and the same has been compared by me with the originals and are correct transcripts therefrom and of the whole of such originals.

Given under my hand and seal this day of August, 1953.

Francis J. Sinnott,
Clerk of Court.

(Seal)

693

[fol. 232] In the Court of Appeals of the State of New York

No. 324

[Repeat Title]

Remittitur—Filed January 22nd, 1954

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 22nd day of January in the year of our Lord one thousand nine hundred and fifty-four, before the Judges of said Court.

Witness, The Hon. Edmund H. Lewis, Chief Judge, Presiding. Raymond J. Cannon, Clerk. (Seal.)

Remittitur January 22, 1954.

[fol. 233] The People &c., Respondent,

vs.

Michael J. Regan, Appellant

Be it remembered, that on the 14th day of November in the year of our Lord one thousand nine hundred and fifty-three, Michael J. Regan, the appellant in this cause, came hereunto the Court of Appeals, by Julius A. Hellenbrand, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent- in said cause, afterwards appeared in said Court of Appeals by Miles F. McDonald, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 234] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Julius A. Hellenbrand, of counsel for the appellant, and by Mr. Aaron E. Koota, of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And thereafter

a motion for reargument and for amendment of the remittitur having been made on the part of the appellant herein and the motion as to reargument having been denied and the motion as to amendment of the remittitur having been granted the said remittitur is amended by adding thereto the following: Upon this appeal there was presented and passed upon the following question: whether defendant had been deprived of liberty without due process of law and whether there had been an abridgement of defendant's privileges and immunities as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States. This Court held that there was no denial of any constitutional right of the defendant.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Kings County, there to be proceeded upon according to law.

[fol. 235] Therefore, it is considered that the said judgment be affirmed, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Kings County, before the Judges thereof, according to the form of statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, January 22, 1954.

[File endorsement omitted.]

[fol. 236] State of New York,

In Court of Appeals.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twelfth day of March A. D. 1954.

Present, Hon. Edmund H. Lewis, Chief Judge, Presiding.

Mo. No. 90

The People &c., Respondent

vs.

Michael V. Regan, Appellant

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended to read as follows:

> Judgment affirmed. Upon this appeal there was presented and passed rpon the following question: whether defendant had been deprived of liberty without due process of law and whether there had been an abridgment of defendant's privileges and immunities as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States. This Court held that there was no denial of any constitutional right of the defendant.

And the County Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A Copy.

Raymond J. Cannon, Clerk.

SUPREME COURT OF THE UNITED STATES

No. 730 ---, October Term, 1953

Michael J. Regan,

Petitioner,

vs.

The People of the State of New York

ORDER ALLOWING CERTIORARI. Filed June 7, 1954.

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

Docket No. [redacted]54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

ELAINE F. FRIEDMAN,
Attorney for Petitioner.

32 CASE PRESS, 30 Forty Street, N. Y. C. COrtlandt 7-0484-0485

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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. .....

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Michael J. Regan prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York, rendered and entered on March 12, 1954, denying a motion for reargument of an appeal to that Court and granting a motion to amend the remittitur in the above cause so as to indicate that a federal question was therein presented and passed upon. A judgment of the County Court, County of Kings, State of New York, rendered on April 9, 1953, convicted the petitioner of the crime of Criminal Contempt of Court (New York Judiciary Law, §750 subdiv. A, 5; New York Code of Criminal

Procedure §619; New York Penal Law §600, subdiv. 6), after a trial by Leibowitz, County Judge, and a special jury (R. 214, f. 640). Petitioner was sentenced to one year in the New York City Penitentiary (R. 219, f. 656). The Appellate Division of the Supreme Court of the State of New York affirmed the conviction without opinion (R. 230, ff. 688-90), but with a brief memorandum reported in 282 App. Div. 755. Leave to appeal and admission of petitioner to bail after he had served part of the sentence, was granted by Associate Judge Froessel of the Court of Appeals, State of New York (R. 277, ff. 679-81). After two months of deliberation, the judgment of the Appellate Division was affirmed without opinion by the Court of Appeals on January 22, 1954. Stay of execution pending determination of motions for reargument and for amendment of the remittitur of the Court of Appeals so as to indicate that a federal question was passed upon, and pending disposition of this petition for certiorari was granted by Associate Judge Fuld of the Court of Appeals.

Opinions Below

No opinions were rendered below in connection with this proceeding, either in the trial court, intermediate appellate court or in the highest court of the state. A memorandum in connection with the affirmance of the judgment of conviction by the Appellate Division as well as the statement by the Court of Appeals in granting the motion of petitioner to amend the remittitur so as to indicate that a federal question was passed upon by that Court, are both set forth in Appendix A, *post*, pp. i, ii.

Jurisdiction

The jurisdiction of this court in invoked under 28 U. S. C. §1257(3). See also Rules 12, 38, Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, as amended. The judgment of the Court of Appeals, State of New York, was entered February 3, 1954. Motion for reargument was denied on March 12, 1954. Grounds for invokement of jurisdiction are that the questions presented by petitioner constitute grave ones of constitutional law involving the rights of petitioner under the due process and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States, insofar as such provisions guarantee in a state criminal proceeding petitioner's rights of privacy, freedom of expression and liberty of silence; his right to counsel; his privilege against self-incrimination; his rights against a mosaic of circumstances of abuse in a criminal proceeding at the hands of respondent; and his right against actual execution by respondent of its threat of a year's imprisonment unless petitioner confess to a series of felonies. Each point involves, in one or more of its aspects, a matter of first impression in this Court.

Questions Presented

The following questions under the Fourteenth Amendment of the Constitution of the United States, having been passed upon by the Court of Appeals of the State of New York adversely to petitioner, are presented:

1. Does the actual execution by a State of its threat of a year's imprisonment unless an involuntary "witness",

appearing only after arrest, against whom a grand jury investigation is in fact being directed, confesses to the commission of a series of felonies, violate the due process clause of the Fourteenth Amendment?

2. Does a signature obtained from such "witness" under numerous particular conditions of abuse at the hands of the State and the insistence by a single presiding and trial judge that such signature operates irrevocably and forever as an effective waiver of federal constitutional rights of privacy, liberty of silence and against actual execution of a threat of punishment for not making full confession of a series of felonies, violate the due process clause of the Fourteenth Amendment?

3. Does such signature thus obtained under circumstances where right to counsel has been denied operate irrevocably and forever as an effective waiver of such federal rights guaranteed by the due process clause of the Fourteenth Amendment?

4. Does the flat denial by a State of both immunity for incriminating answers and the right to refuse to answer incriminating questions, under the circumstances of this case, constitute a denial of due process of law or an abridgement of the privileges and immunities of citizens of the United States, under the Fourteenth Amendment?

5. Does actual punishment at the hands of a State for failure to confess to a series of felonies, constitute an invasion of privacy and denial of both liberty of silence and freedom of expression guaranteed by the due process clause of the Fourteenth Amendment?

Reasons Relied on for the Allowance of the Writ

A. Repeatedly this Court has considered use of threats and torture by a State to obtain a confession leading to conviction of a crime a denial of due process of law in a procedural sense. Certainly infliction of punishment in the name of the State for failure of an involuntary "witness" under arrest to make such confession can be no less a denial of due process under the Fourteenth Amendment.

B. It was error for the presiding and trial judge to hold as a matter of law that a signature obtained under conditions of abuse operated irrevocably and forever to waive rights guaranteed by the due process clause of the Fourteenth Amendment involving liberty of silence, privacy and the right not to be punished for refusing to confess to a series of felonies. The conditions of abuse at the hands of the State surrounding the obtaining of the signature include (1) Threat of instant dismissal from civil employment for failure to sign; (2) No explanation of consequences of signing or advice concerning rights not to sign; (3) Obtaining signatures *en masse* in a crowded room so hurried as to make intelligent comprehension of what was involved virtually impossible; and (4) Avowal by the highest court of the State one month and five days later that "doubt and uncertainty" existed even at *that* time concerning the operation of such signature as an effective waiver of immunity for so short a period as ten days *in futuro*, and that the unsettled nature of the law justified a witness' refusal to answer and entitled him to release after conviction of criminal contempt of court by writ of habeas corpus. *People ex rel. Hofsaes* v. *Warden of City Prison*, 302 N. Y. 403, 406. The holding as a matter

of law that such signature operates as an effective waiver for almost twenty-two months *in futuro* is also a denial of due process under the Fourteenth Amendment.

C. Total deprivation by a State of immunity under the circumstances of this case coupled with punishment at the hands of the State for refusal to answer incriminating questions, deprives an involuntary "witness" under arrest of a right "implicit in the concept of ordered liberty" in violation of the due process clause of the Fourteenth Amendment. A comparative test of contemporary constitutions and statutes of English-speaking peoples throughout the world (Appendix B, *post*, p. iii) is one indication of the minimum requirement of due process of law with respect to the right thus denied. Such right was a settled mode and usage of proceeding under the common and statute law of England before the Declaration of Independence which has been shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. The deprivation of this right by a State under the circumstances of this case also contravenes the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment.

D. Compulsion to speak and confess at the hands of the State invades privacy and denies liberty of silence and freedom of expression in violation of due process in a substantive sense insofar as that clause in the Fourteenth Amendment has made applicable to the States the restrictions imposed on the federal government in the First Amendment.

Constitutional and Statutory Provisions Involved

Constitution of the United States of America Article XIV, §1:

> "* * *. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

Constitution of the State of New York, Article 1, §6:

> "* * * nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Code of Criminal Procedure, §10:

> **"No person to be a witness against himself in a criminal action or to be unnecessarily restrained**
>
> "No person can be compelled in a criminal action to be a witness against himself, * * *."

Penal Law, §381:

> **"Offender a competent witness; witnesses' privileges**
>
> "A person who has violated any section of this chapter relating to bribery or any section of this

article or who has committed an attempt to violate any such section is a competent witness against another person so offending. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, or before any joint legislative committee, upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial."

[To the same effect, see also *Penal Law* §§584 (Conspiracy) and 996 (Gambling).]

Code of Criminal Procedure, §619:

"Disobedience to subpoena, or refusal to be sworn or to testify, how punished

"Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law."

Judiciary Law, §750:

"Power of courts to punish for criminal contempts

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and not others: • • •

"5. Contumacious and unlawful refusal to be sworn as a witness; or after, being sworn, to answer any legal and proper interrogatory * * * ".

Judiciary Law, §751:

"Punishment for criminal contempts

"Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. * * * "

Penal Law, §600:

'Criminal contempt

"A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

"6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * *."

Statement of the Case

Petitioner served as a patrolman in the police department of the city of New York from August 7, 1942 until his resignation on March 27, 1951 (R. 77-79, ff. 225-30). On March 7, 1951, he was subpoenaed to testify before the grand jury of the county of Kings. Petitioner went to an anteroom, "10 x 10, or 12 x 12" in size (R. 157, f. 470), with a desk in the room of "about 60 x 2" (R. 157, f. 471), with a bench, with about 35 people present (R. 158, f. 474), to which group an assistant district attorney made a single speech (R. 160, f. 480) and from all of whom he obtained

en masse waivers of immunity within a space of twenty-five minutes (R. 165, f. 494).

The examination of petitioner was adjourned and he resigned from the police force to enter private business on March 27, 1951. On December 22, 1952, almost twenty-two months after the signing of the waiver of immunity, petitioner was arrested and made to re-appear as a witness before the grand jury. At that time, an assistant district attorney put these questions to petitioner:

> "Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers?"
>
> "Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York did you receive any bribes from bookmakers?" (R. 9, ff. 26-7).

Petitioner, aware for the first time that he was under investigation by the grand jury, accordingly responded:

> "I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> "I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity. I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having

> served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such" (R. 122-23, ff. 366-68).

On January 5, 1953, County Judge Leibowitz directed petitioner to answer the questions under an "effective waiver of immunity" (R. 127, f. 381). Upon petitioner's reiteration of his constitutional privilege, an indictment was returned by the same grand jury, which indictment accused petitioner of "knowingly, wilfully and corruptly committing the crime of Criminal Contempt of Court against the form of the statute in such case made and provided" (R. 10, f. 30).

In summation, at trial of the petitioner, the assistant district attorney thus characterized petitioner's predicament before the grand jury:

> "This is the position this man was in: If he answered the truth, if it was the truth, 'Yes, I took bribes from a bookmaker,' having signed this waiver of immunity, he could be prosecuted for perjury—both bribery, accepting bribes from bookmakers, and perjury, which are very serious felonies. The crime for which he stands indicted here is a misdemeanor. *So he was confronted with this alternative*: **[1]** If he answers 'Yes, I took a bribe,' he is going to be prosecuted for bribery. **[2]** If he says, 'No,' and

> it is not the truth, he is going to be prosecuted for perjury. If he said, 'No,' and it was the truth, then it was the simplest thing for him to say, 'No, I never took a bribe.' So what could he do? **[3]** He could not answer that question * * *" (R. 178-79, ff. 534-37).

Throughout these proceedings the district attorney has maintained that petitioner was either compelled to incriminate himself or suffer a year's imprisonment for contempt. The trial judge stated:

> "I agree with Assistant District Attorney Koota. It is not only the law, but common sense" (R. 208, f. 623).

The same judge flatly refused upon request of counsel for petitioner, to leave any issue of contumacity to the jury:

> "As to what his reasons were or what his purpose was is not a defense" (R. 207, f. 621).

The federal questions sought to be reviewed were raised at the very outset of the proceedings by petitioner himself in his refusal to answer (R. 122-23, ff. 366-68), in a motion before trial to dismiss the indictment on March 4, 1953 (R. 57-58, ff. 171-72), in a motion at the close of the prosecution's case at trial (R. 147, f. 439), upon examination of witnesses by defendant at trial (R. 168, ff. 504-06), in exceptions to request to charge (R. 209, ff. 627-28), and in oral argument and brief on appeal to the Court of Appeals (Defendant-Appellant's Brief, Point III, p. 36-43; Respondent's Brief, p. 41). Upon motion by petitioner, the Court of Appeals amended its remittitur so as to indicate that these federal questions were raised and passed upon by that court [Appendix A, *post*, p. ii].

ARGUMENT

POINT I

Actual execution at the hands of the State of its threat of a year's imprisonment unless an involuntary "witness" under arrest confesses to a series of felonies violates the due process clause of the Fourteenth Amendment.

Concededly the questions put to petitioner, an involuntary "witness" under arrest, could be responsively answered only by a confession to a series of felonies:

> "Q. While **you** were a plainclothesman in the Police Department of the City of New York did **you** ever accept or receive any bribes from bookmakers or other gamblers?"
>
> "Q. I now ask **you**, Mr. Regan, while **you** were a plainclothesman in the Police Department of the City of New York did **you** receive any bribes from bookmakers?" (R. 9, ff. 26-7).

That this investigation of the grand jury was directed against the petitioner, was frankly admitted by the district attorney in the indictment.

> "That said Grand Jury was investigating whether the **defendant** had received and accepted bribes in the County of Kings from bookmakers and gamblers to permit said gamblers and bookmakers to continue their gambling activities without police interference and to afford said bookmakers and gamblers police protection; whether this **defendant** was in the possession of money, income or other assets which represented the proceeds of bribes given to **him** by

gamblers and bookmakers in the County of Kings" (R. 9-10, ff.27-8).

Repeatedly this Court has held that the due process clause of the Fourteenth Amendment is violated when a St. ' employs threats or punishment to obtain a confession of crime or otherwise. *Wieman* v. *Updegraff*, 344 U. S. 183; *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401. There is indeed little qualitative difference between the actual execution by a State of its threat of a year's imprisonment unless the witness provides incriminating evidence against himself, on one hand, and threat of dismissal unless a test oath is taken (*Wieman*), or five days of questioning while incommunicado unless such incriminating evidence is provided (*Chambers*), or thirty-six hours of such interrogation (*Ashcraft*), or stripping the witness (*Malinski*), on the other hand, so far as the requirements of the Due Process Clause embrace "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York*, *supra*, 324 U. S. at page 416-17; *Rochin* v. *California*, *supra*, 342 U. S. at page 169.

POINT II

A mosaic of circumstances of abuse, including denial of the right of counsel, surrounding the State's obtaining of petitioner's signature, and the holding that such signature was effective as a waiver of immunity on the occasion of interrogation almost twenty-two months later, denied petitioner due process of law.

It was error for the presiding and trial judge to hold as a matter of law that a signature obtained under conditions of abuse operated irrevocably and forever to waive rights guaranteed by the due process clause of the Fourteenth Amendment involving liberty of silence, privacy and the right not to be punished for refusing to confess to a series of felonies. The conditions of abuse at the hands of the State surrounding the obtaining of the signature include (1) Threat of instant dismissal from civil employment for failure to sign; (2) No explanation of consequences of signing or advice concerning rights not to sign; (3) Obtaining signatures *en masse* in a crowded room so hurried as to make intelligent comprehension of what was involved virtually impossible; and (4) Avowal by the highest court of the State one month and five days later that "doubt and uncertainty" existed even at *that* time concerning the operation of such signature as an effective waiver of immunity for so short a period as ten days *in futuro*, and that the unsettled nature of the law justified a witness' refusal to answer and entitled him to release after conviction of criminal contempt of court by writ of habeas corpus. *People ex rel. Hotsay v. Warden of City Prison*, 302 N. Y. 403, 406. The holding as a matter

of law that such signature operates as an effective waiver for almost twenty-two months *in futuro* is also a denial of due process under the Fourteenth Amendment.

Clearly, in a State criminal proceeding, denial of the right to counsel infringes the due process clause of the Fourteenth Amendment in a procedural sense because the defendant has had no hearing in the sense of reasonable comprehension of what transpired. *Powell* v. *Alabama*, 287 U. S. 45. In a non-capital State case, the Supreme Court has said (*Uveges* v. *Pennsylvania*, 335 U. S. 437, 441) that only when there has been refusal of "counsel with an understanding of his rights can the court dispense with counsel". The petitioner in this case had no "understanding of his rights" at the time he signed the paper on March 7, 1951, in view of the numerous additional circumstances of abuse. When petitioner later retained counsel, attempts to withdraw the waiver were unavailing. The act of signing was forever irrevocable. Its effect was devastating, as the decision of this Court in the instant case makes clear. No later proceeding at which petitioner was represented by counsel could cure the denial on March 7, 1951, and in this respect this case is distinguishable from *Canizio* v. *New York*, 327 U. S. 82, and *Gayes* v. *New York*, 332 U. S. 145.

POINT III

The flat denial by a State of both immunity for incriminating answers and the right to refuse to answer incriminating questions, under the circumstances of this case, constitutes a denial of due process of law and an abridgement of the privileges and immunities of citizens of the United States under the Fourteenth Amendment.

Consider as the federal constitutional question in this case the provision of the Fourteenth Amendment, "Nor shall any State deprive any person of life, liberty, or property, without due process of law." Several tests of due process in State criminal proceedings have been enunciated by the Supreme Court of the United States. A familiar one, first voiced by Justice Cardozo (*Palko* v. *Connecticut*, 302 U. S. 319, 325), and reiterated by Justice Frankfurter in *Wolf* v. *Colorado*, 338 U. S. 25, at page 27, is that the due process clause "exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty'." Is the right against self-incrimination implicit in the concept of ordered liberty? In the same case, the Supreme Court held that the right against unreasonable search and seizure was thus implicit. Justice Frankfurter, writing the opinion, explicitly based the decision upon the intrusion of privacy (*Id.*, 338 U. S. at pages 27, 28, 29):

> "The security of one's **privacy** against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'concept of ordered

> liberty' and as such enforceable against the States through the Due Process Clause. * * *
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into **privacy** it would run counter to the guaranty of the Fourteenth Amendment. * * *
>
> "As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the **right of privacy** might give different answers."

So far as the interest in privacy is to be weighed, intrusion by unreasonable search and seizure offers no greater violation than denial of the privilege against self-incrimination.

The so-called comparative test of what constitutes a fundamental right protected by the due process clause of the Fourteenth Amendment, *cf. Powell* v. *Alabama*, 287 U. S. 45, clearly indicates that the privilege against self-incrimination is of the very essence of liberty. Not only the Federal Constitution itself (Amend. V) but those of 46 out of 48 States, as well as statutes in those States and other English-speaking communities of the world [Appendix B, *post*, p. iii-v], guarantee such privilege. And the so-called historical test of what constitutes due process, would most certainly require guarantee of the privilege against self-incrimination from infringement by a State. It was a settled usage and mode of proceeding under the common and statute law of England before the Declaration of Independence which has been shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it

became a nation. *Cf. Lowe* v. *Kansas*, 163 U. S. 81, 85; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-277.

The circumstances of abuse in the instant case, the sharply contrasted facts under which the privilege was asserted, the recent decisions of this Court in *Wolf* v. *Colorado*, and *Rochin* v. *California*, *supra*, call for re-examination by the Court of its sharply divided opinions in *Adamson* v. *California*, 332 U. S. 46 and *Twining* v. *New Jersey*, 211 U. S. 78. Indeed since adoption of the Fourteenth Amendment, at least twenty-one justices of this Court have indicated their belief that the Fourteenth Amendment prohibits flat denial by a State of the privilege against self-incrimination. *Cf. Adamson* v. *California*, 332 U. S. at pages 68-123.

Accepting for the moment as the test of the federal question in this case, the restrictions imposed upon the States by the provision of the Fourteenth Amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States", what are the privileges or immunities of citizens of the United States? Certainly these have been defined in the Bill of Rights contained in the first eight amendments to the Constitution and include the privilege against self-incrimination. Concurring in *Rochin* v. *California*, 342 U. S. 165, at pages 174-5, Justice Black repeated his

> "belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that 'No person * * * shall be compelled in any criminal case to be a witness against himself.'"

And Justice Douglas said in concurrence, *Id.*, 342 U. S. at pages 178-9:

> "As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

POINT IV

Compulsion to speak and confess at the hands of the State invades privacy and denies liberty of silence and freedom of expression in violation of due process in a substantive sense insofar as that clause in the Fourteenth Amendment has made applicable to the States the restrictions imposed on the federal government in the First Amendment.

The evolution of the doctrine that the due process clause of the Fourteenth Amendment of the Constitution of the United States protects the individual's "liberty of silence" and "right of privacy" against State interferences such as that in the instant case is hardly a generation old. As late as 1922, the Supreme Court said in *Prudential Insurance Co. v. Cheek*, 259 U. S. 530 at page 543:

> "(N)either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."

It goes without saying that no statement has ever been more squarely repudiated by a court than this one in several score of cases before the Supreme Court in the past two decades, beginning with an assumption *arguendo* in *Gitlow* v. *New York*, 268 U. S. 652 in 1925, and with the first square holding that freedom of speech is protected by the Fourteenth Amendment in *Near* v. *Minnesota*, 283 U. S. 697 in 1931. It would be unnecessary and repetitious to review all of these cases to determine the scope of freedom of speech, liberty of silence and right of privacy which the Supreme Court has held within the ambit of the Fourteenth Amendment. From some of the most recent decisions, it is clear that the Fourteenth Amendment protects individual liberty of silence and right of privacy against State governmental invasion such as the misuse of grand jury subpoena in the instant case.

As indicated, the Fourteenth Amendment protects the individual against invasion of privacy at the hands of the State. *Wolf* v. *Colorado*, *supra*, 338 U. S. 25 at pages 27, 28, 29; *Rochin* v. *California*, *supra*, 342 U. S. 165 at page 172. Compulsion to speak in flat repudiation of a Constitutional right to remain silent can be no less an intrusion upon privacy, and clearly violates liberty of silence and freedom of expression.

CONCLUSION

Wherefore, it is respectfully submitted that this petition
r a writ of certiorari should be granted.

ELAINE F. FRIEDMAN,
Attorney for Petitioner.

APPENDIX A

OPINIONS BELOW

Memorandum of Appellate Division, Supreme Court of the State of New York, reported in 282 App. Div. 775.

> "People, &c., res. v. Regan, ap—Defendant appeals from a judgment of the County Court, Kings County, convicting him of criminal contempt of court, and from 'each and every intermediary order therein made.' It was defendants' contention upon the trial that a waiver of immunity executed by him, prior to his appearance before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the district attorney had failed to advise him with respect to his rights. The question of whether defendant signed the waiver knowingly and fully aware of its import and consequences was submitted to the jury as a question of fact. Judgment unanimously affirmed. Assuming, without deciding, that the district attorney was under a duty to advise defendant of the nature and effect of the waiver of immunity and his rights with respect thereto, we are of the opinion that the proof established, beyond a reasonable doubt, that defendant had been so advised and had voluntarily and knowingly executed the waiver. Defendant's other contentions have been examined and are without merit. The minutes of the preliminary hearings, printed in the record, have not been considered in reaching this determination. No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction (Code of Criminal Procedure, Sec. 517)."

Order of the Court of Appeals of the State of New York, March 12, 1954, granting petitioner's motion to amend the remittitur.

"FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended to read as follows:

Judgment affirmed. Upon this appeal there was presented and passed upon the following question: whether defendant had been deprived of liberty without due process of law and whether there had been an abridgment of defendant's privileges and immunities as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States. This Court held that there was no denial of any constitutional right of the defendant.

AND the County Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

"A copy

[Sgd.] RAYMOND J. CANNON
[SEAL] Clerk"

APPENDIX B

PROTECTION AGAINST SELF-INCRIMINATION AS A FUNDAMENTAL RIGHT

1. American Constitutional Guarantees Against Self-Incrimination

Every American jurisdiction except two has a constitutional guarantee against self-incrimination. **U. S.**, Amend. V; **Ala.**, Art. I, §6; **Ariz.**, Art. II, §8; **Calif.**, Art. I, §13; **Col.**, Art II, §18; **Conn.**, Art. I, §9; **Del.**, Art I, §7; **Florida**, Decl. of R., §12; **Ga.**, Art. I, §1, par. 6; **Idaho**, Art. I, §13; **Ill.**, Art. II, §10; **Ind.**, Art. I, §14; **Kan.**, Bill of R. §7; **Ky.**, §11; **La.**, Art. I, §11: **Me.**, Art. I, §6; **Md.**, Decl. of Rights, Art. 22; **Mass.**, Decl. of R., Art. 12; **Mich.**, Art. II, §16; **Minn.**, Art. I, §7; **Miss.**, Art. III, §26; **Mo.**, Art. II, §23; **Mont.**, Art. III, §18; **Nebr.**, Art. I, §12; **Nev.**, Art. I, §8; **New Hampshire**, Part I, Art. 15; **New Mexico**, Art. II, §15; **N. Y.**, Art. I, §6; **N. C.**, Art. I, §11; **N. D.**, Art. I, §13; **Ohio**, Const. 1851, Art. I, §10, as amended 1912; **Okla.**, Art. II, §21; **Ore.**, Art. I, §12; **Pa.**, Art. I, §9; **R. I.**, Art. 1, §13; **S. C.**, Art. I, §17; **S. D.**, Art. VI, §9; **Tenn.**, Art. I, §9; **Tex.**, Art. I, §10; **Utah**, Art. I, §12; **Vt.**, Ch. 1, Art. 3; **Wash.**, Art. 1, §9; **W. Va.**, Art. III, §5; **Wis.**, Art. I, §8; **Wyo.**, Art. I, §11.

2. American Territorial and Other Statutory Provisions Guaranteeing the Privilege

In addition to statutes in the 46 states mentioned above, statutory provisions affirming the privilege against self-incrimination also exist in these American jurisdictions: **Federal**, St., 1950, May 5, 81st C., 2nd Sess., cp. 169, Uniform Code of Military Justice, Part VI, Art. 31 (a), (b); St. 1948, June 24, 2nd Sess., 80th C., c. 625, Tit. II, Selective

Service Act, §214, 1948, 28, U. S. C. §1785; 48 U. S. C., §737; 10 U. S. C. §1495; 28 U. S. C. §702; 34 U. S. C. §1200; St. 1909, Feb. 16, c. 131, §12, Art. of the Navy, 1942; **Alaska**, Comp. L. 1913, §1507. Comp. L. 1933, §4265; **Canal Zone**, Code 1934, §1, par. 8e; C. C. P. 1934, §2142; C. Cr. P. 1934, §10; §673; **Hawaii**, Rev. L. 1925, §2619, Rev. L. 1935, §3827; **Puerto Rico**, U. S. St. 1917, Mar. 2, Organic Act, §2, 39 Stats. 951, Code 1919, §4043; P. R. Rev. St. & C. 1911, §1532, C. C. P. 1933, §526, C. Cr. P. 1935, §7, 1902, Re Decker, 1 P. R. Fed. 381; **Virgin Islands**, Com. C. 1920, tit. V, c. 1, §7.

3. Statutory Guarantees Against Self-Incrimination in English Speaking Countries

Practically every English speaking country has one or more statutory guarantees of the privilege against self-incrimination. **England**, 1806, St. 46 Geo. III, c. 37; 1851, St. 14 & 15 Vict. c. 99, §3; St. 1869, 32 & 33 Vict. c. 68, §3; 1898, St. 61 & 62 Vict. c. 36, §1; St. 1904, 4 Edw. VII, c. 15, §12; St. 1947, 10 and 11 Geo. 6, c. 43, Local Government (Scotland) Act, Part XX, §355(4); St. 1947, 10 and 11 Geo. 6, c. 47, Companies Act, Part I, §42(4). **Ireland**, St. 1944, No. 10, Midwives Act, Part III, §27. St. 1944, No. 21, Transport Act, c. 6, §43. St. 1944, No. 21, Transport Act, c. 6, §43. **Northern Ireland**, St. 1923, c. 9, Criminal Evidence Act. §1; St. 1946, Aug. 29, 10 & 11 Geo. 6, c. 21, Part V, §60. **Alberta**, St. 1910, 2d sess., c. 3, Evidence Act, §8, Rev. St. 1922, c. 87, §8; St. 1945, c. 10, The Coroners Act §21(1); St. 1947, Mar. 31, c. 42, The Alberta Evidence Act, amend. §8. **British Columbia**, Rev. St. 1924, c. 70, §27, Rev. St. 1936, c. 76, §27. **New Brunswick**, Consol. St. 1903, c. 127, §9, Rev. St. 1927, c. 131, §9; C. S. 1903, c. 127, §10, R. S. 1927, c. 131, §10. **Newfoundland**, Consol. St. 1916, c. 91, §2;

St. 1943, No. 45, Rent Restrictions Act, §10; St. 1946, May 21, No. 16, National Convention Act, §96; St. 1951, June 22, No. 45, The Local Government (Elections) Act, 1951, §92(3). **Nova Scotia**, Rev. St. 1900, c. 163, §37, Rev. St. 1923, c. 225, §37; St. 1947, May 29, c. 8, The Nova Scotia Factories Act, §32. **Ontario**, Rev. St. 1927, c. 107, §6, Rev. St. 1937, c. 119, §6. St. 1951, Apr. 5, c. 21, The Election Act, 1951, §153. **Prince Edward's Island**, St. 1889 c. 9, §6. **Yukon**, Consold. Ord. 1914, c. 30, §37.

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IN THE

Supreme Court of the United States

October Term, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York City 5

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Opinions Below

No opinions were written below other than a memorandum of the Appellate Division upon affirmance which is reported in 282 App. Div. 775 and is set forth in Appendix "A" hereto.

Matters Related to Jurisdiction

(a) Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. 1257 (3).

(b) Timeliness

The judgment of the Court of Appeals,—the highest court in the State in which a decision could be had was filed on January 22, 1954. The amended Remittitur of the Court of Appeals was entered on March 12, 1954. Application for Writ of Certiorari was filed on April 25, 1954, and the Writ was granted on June 10, 1954.

(c) How Constitutional Questions Raised

Petitioner at his appearance before the grand jury which culminated in his subsequent prosecution raised the constitutional objections embraced here (R. p. 122, f. 366). Subsequently, at the opening of the trial a motion was made to dismiss the indictment and the constitutional claims were made (R. p. 57, f. 171). At the end of the prosecution's case (R. p. 147, f. 439), the motion was renewed. By exceptions to the trial court's charge to the jury the constitutional objections were again raised (R. p. 209, f. 626). The Court of Appeals amended its remittitur to indicate that the Federal questions were raised (R. p. 234).

Constitutional Provisions and Statutes Involved

"Constitution of the United States of America, Article XIV, Section 1:

'* * *. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.'

Constitution of the State of New York, Article 1, Section 6:

'* * * nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant questions concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.'

Charter of the City of New York, Section 903:

'If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any country included within its territorial limits, or regarding the nominations, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.'

Code of Criminal Procedure, Section 10:

'No person to be a witness against himself in a criminal action or to be unnecessarily restrained.

'No person can be compelled in a criminal action to be a witness against himself, * * * '

Penal Law, Section 381:

'Offender a competent witness; witnesses' privileges 'A person who has violated any section of this chapter relating to bribery or any section of this article or who has committed an attempt to violate any such section is a competent witness against another person so offending. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, or before any joint legislative committee, upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter of thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial.'

(To the same effect, see also Penal Law Section 584 (Conspiracy) and Section 996 (Gambling).)

'5. Contumacious and unlawful refusal to be sworn as a witness; or after, being sworn, to answer any legal and proper interrogatory * * * '.

Judiciary Law, Section 751:

'Punishment for criminal contempts

'Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court * * * '

Penal Law, Section 600:

'Criminal contempt

'A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

'6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * * ' "

A judgment of the County Court, County of Kings, State of New York, was rendered on April 9, 1953, convicting the petitioner of the crime of Criminal Contempt of Court (New York Judiciary Law, Section 750, subdiv. A, 5; New York Code of Criminal Procedure, Section 619; New York Penal Law, Section 600, subdiv. 6), after a trial by Leibowitz, County Judge, and a special jury (R. 214, f. 640). Petitioner was sentenced to one year in the New York City Penitentiary (R. 219, f. 656). The Appellate Division of the Supreme Court of the State of New York affirmed the conviction without opinion (R. 230, ff. 688-90), but with a brief memorandum reported in 282 App. Div. 755. Leave to appeal and admission of petitioner to bail was granted by a judge of the Court of Appeals (R. 277, ff. 679-81). The Court of Appeals affirmed his conviction. Stay of execution pending disposition of this petition for certiorari was granted by a judge of the Court of Appeals.

Questions Presented

1. Does compulsion to testify under threat of imprisonment for one year after a waiver of immunity was obtained by duress constitute a denial of due process under the Fourteenth Amendment to the Constitution of the United States?

2. Did the execution of a waiver of immunity by the petitioner under the circumstances of the facts of this case effectively waive his rights to be silent under the Federal Constitution?

3. Was the execution of the waiver of immunity by the petitioner surrounded by such circumstances as to constitute a denial of due process of law?

4. Was the threat to petitioner of a loss of his employment under Section 903 of the Charter of the City of New York for a refusal to sign the waiver of immunity a denial of due process of law if such waiver was obtained by reason of that law?

5. Was the judgment of conviction of the petitioner for criminal contempt of court and his sentence of imprisonment for one year a denial of due process of law, considering all the circumstances that embrace his conviction?

Statement of the Case

Petitioner served as a patrolman in the police department of the City of New York from August 7, 1942 until his resignation on March 27, 1951 (R. 77-79, ff. 225-30). On March 7, 1951, he was subpoenaed to testify before the grand jury of the County of Kings. Petitioner went to an

anteroom, "10 x 10, or 12 x 12" in size (R. 157, f. 470), with a desk in the room of "about 60 x 2" (R. 157, f. 471), with a bench, with about 35 people present (R. 158, f. 474), to which group an assistant district attorney made a single speech (R. 160, f. 480) and from all of whom he obtained en masse waivers of immunity within a space of twenty-five minutes (R. 165, f. 494).

The examination of petitioner was adjourned and he resigned from the police force to enter private business on March 27, 1951. On December 22, 1952, almost twenty-two months after signing of the waiver of immunity, petitioner was arrested and made to re-appear as a witness before the grand jury. At that time, an assistant district attorney put these questions to petitioner:

> "Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers?
>
> "Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York did you receive any bribes from bookmakers?" (R. 9, ff. 26-7)

Petitioner stated in reply:

> "I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> "I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver

> was I explained my Constitutional rights of the meaning of the waiver of immunity. I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such." (R. 122-23, ff. 366-68).

On January 5, 1953, County Judge Leibowitz directed petitioner to answer the questions under an "effective waiver of immunity" (R. 127, f. 381). Upon petitioner's reiteration of his constitutional privilege, an indictment was returned by the same grand jury, which indictment accused petitioner of "knowingly, wilfully and corruptly" committing the crime of Criminal Contempt of Court against the form of the statute in such case made and provided" (R. 10, f. 30).

In summation, at trial of the petitioner, the assistant district attorney thus characterized petitioner's predicament before the grand jury:

> "This is the position this man was in: If he answered the truth, if it was truth, 'Yes, I took bribes from a bookmaker,' having signed this waiver of immunity, he could be prosecuted for perjury—both bribery, accepting bribes from bookmakers, and per-

jury, which are very serious felonies. The crime for which he stands indicted here is a misdemeanor. So he was confronted with this alternative: (1) If he answers 'Yes, I took a bribe,' he is going to be prosecuted for bribery. (2) If he says, 'No,' and it is not the truth, he is going to be prosecuted for perjury. If he said 'No,' and it was the truth, then it was the simplest thing for him to say, 'No, I never took a bribe.' So what could he do? (3) He could not answer that question * * * " (R. 178-79, ff. 534-37).

POINT I

The waiver of immunity was compelled by Section 903 New York City Charter.

When the waiver of immunity was obtained from the petitioner, he was faced with the proverbial dilemma of jumping from the frying pan into the fire. This, of course, assumes that he knew what he was signing. If he did not sign, he would lose his job by virtue of Section 903 New York Charter. If he did sign, he was deprived of the protection granted against self-incrimination by Article 1, Section 6 of the New York Constitution. If he then answered "yes" to the question put to him, he was guilty of bribery. If he answered "no" and that was untruthful, he could be prosecuted for perjury.

Thus, the petitioner was placed in this predicament by reason of the effort by the respondent to prove his guilt by his own words. As shown, this procedure was based upon the compulsion of the statute.

The waiver was signed by virtue of the compulsion of Section 903 New York Charter. When Assistant District

Attorney Clarke testified the following transpired (R. 161, f. 482):

> "2. Now, at that time, Mr. Clarke, did you tell Mr. Regan that if he did not sign the waiver, that you would report that fact to the Police Commissioner? A. I certainly did."

This was followed by the Court's observation to the jury (f. 483):

> "The Court (To the jury): Gentlemen, the District Attorney had a perfect right to say that to him under the law. He would be required to report it to the Police Commissioner. When a policeman refuses to sign a waiver in a matter of this kind, he automatically forfeits his job as soon as the Police Commissioner hears about it. The District Attorney would, therefore, be in duty bound to notify the Police Commissioner that a policeman refused to sign a waiver.
>
> You may proceed.
>
> Mr. Hellenbrand: May I note my exception to that particular remark?
>
> The Court: Yes, you have an exception to the statement of the Court."

Therefore, at the time the waiver was obtained and when thirty-five men executed waivers, all in a space of twenty-five minutes (ff. 491, 492) all less than a minute per man, as an average, this petitioner had before him within that minute the alternative of signing or losing the job he had for about nine years. Since he was human, the easier choice was made in that minute of saving his employment.

Contrary to what was said in *McAuliff* v. *New Bedford*, 155 Mass. 216, 220, that petitioner has no constitutional

right to be a policeman, this Court has stated the right of employment to be a constitutional guarantee, and has so protected it. *Garner* v. *Los Angeles*, 341 U. S. 716 and *Wieman* v. *Updegraff*, 344 U. S. 183 are recent examples of such expressions.

The threat of losing employment is a species of duress akin to the other forms of duress familiar to this Court. The test is, what was the likelihood of the voluntariness of statement, absent the compulsion practiced? The *Adler* and *Wieman* cases are closely related because the compulsion of dismissal from employment was the sanction for failure to take a test oath.

Aside from all additional considerations of this case, petitioner submits that the force of Section 903 in subjugating petitioner's will so as to deprive it of voluntariness renders the obtaining of the waiver of immunity a denial of due process.

Consequently, when this led to his conviction for contempt through a chain of events to a refusal to testify under such waiver, then such conviction was a denial of due process.

POINT II

The waiver of immunity was signed under circumstances amounting to a denial of due process.

If this petitioner had not signed the waiver of immunity he would, in the absence of the provisions of Section 903 of the New York Charter have been entitled to the immunity conferred by New York Penal Law, Section 381 in instances where testimony is compelled in bribery cases.

If such immunity is removed through a waiver, then the witness has been deprived of the protection against self-incrimination found in the New York Constitution as well as of the protection of immunity statute Section 381 Penal Law.

It, therefore, follows that the procedure of obtaining a waiver of immunity is a more solemn event than what happened in this case, in that here thirty-five (35) waivers were obtained from thirty-five (35) witnesses in twenty-five (25) minutes (ff. 491, 492).

The circumstances that makes the exaction from petitioner of his repudiation of his constitutional rights and statutory as the price of testifying, so abhorrent to American concepts of justice are as follows: This is a quotation from the respondent's version in "Brief in Opposition to Petition for Writ of Certiorari" in this case, pages 11 and 12. It is based on the testimony of Assistant District Attorney Clarke, who was delegated to obtain the waiver. The facts are therefore deemed an admission by respondent of its version of the event. We quote:

> "Petitioner did not testify in his own behalf. He called as his sole witness Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.
>
> The waiver of immunity was read by petitioner before he signed it (492). Mr. Clarke, stated that he was familiar with the procedure and practice of summoning witnesses before the Grand Jury (449). He was the individual who had requested petitioner to execute the waiver (449). The waiver was signed in an ante-room adjacent to the Grand Jury, in which were contained a desk and bench (470, 471). The

> room was crowded at one time and there might have been thirty-five or twenty-five men present when the waiver was signed (477). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (480, 490). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (482). He advised petitioner 'as to what this Grand Jury was concerned with' at or before he signed the waiver (485), and that 'if he is going to be put in the Grand Jury he must sign the waiver.' (488)
>
> Twenty-five minutes were consumed by the thirty-five men in executing their respective waivers, all in the immediate presence of Mr. Clarke, including petitioner (491, 492). The latter called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it (501, 502).
>
> On March 7, 1951, the treatment of petitioner in the anteroom was the same as was accorded to the other patrolmen who were executing waivers" (432).

During the event, petitioner had no counsel (f. 506).

It was after he had the benefit of counsel that he asserted his doubt as to the effectiveness of his waiver (R. 122, ff. 366-368).

Under these circumstances, admitted by the respondents, it can be concluded that the waiver was obtained by events that are a pattern of duress and lack of understanding. Too much emphasis cannot be placed on the procedure at the time whereby thirty-five (35) waivers were obtained in a mass gathering in the form of People's Exhibit 2 (f. 433) in twenty-five minutes or less than one a minute. What

understanding could there have been in a mob scene of such nature? What opportunity for thinking or deliberation was afforded to a mob of thirty-five being addressed on the subject of waivers in a small room by a person exercising the authority of a District Attorney? The answer is obvious.

Although the jury passed upon the question of the petitioner's understanding and voluntariness in assessing the waiver of immunity, nevertheless, its conclusion does not foreclose this Court's inquiry into the legal conclusions. Only recently, this Court had before it a case involving a confession obtained in a case tried not only in the same State, but also in the same Trial Court—*Leyra* v. *Denno*, 98 L. ed. Adv. p. 631. In that case, this Court inquired whether the confession was voluntary, even though the jury had inferentially found the confession "voluntary". Said this Court: "The question for our decision is therefore whether the present confessions were so coerced. This question can only be answered by reviewing the circumstances surrounding the confessions. We, therefore, examine the circumstances as shown by the undisputed facts of this case."

See, also, *Stroble* v. *Calif.*, 343 U. S. 181; *Stein* v. *New York*, 346 U. S. 156; *Watts* v. *Indiana*, 338 U. S. 49; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Lisenba* v. *Calif.*, 314 U. S. 219.

POINT III

The doubt as to the effectiveness of the waiver should have excused the failure to answer.

The petitioner stands convicted because he had refused to answer, because among other things, the lapse of time between the execution of the waiver on March 7, 1951, and the call for his testimony on December 22, 1952, was of such a length of time as to create a doubt as to whether the waiver was still effective. He was not the only one in doubt, for the New York Court of Appeals in another case expressed doubt in *People ex rel. Hofsaes* v. *Warden,* of City Prison, 302 N. Y. 403, 406, whether a waiver operated in the future for even ten days. The doubt there was sufficient to warrant the excusing of the defendant from criminal contempt. In any event, there was a legitimate doubt in the mind of petitioner. His refusal to testify a year and a half after the execution of the waiver was substantial to him. Even the Trial Court realized the significance of such doubt when he charged the jury that if the waiver was not an effective one then the petitioner had a right to remain silent. The Trial Court charged the jury (f. 600):

> "If an effective waiver was signed by him, if he knew full well what he was doing when he went into that Grand Jury room in March of 1951, that waiver was good for all time thereafter." * * *
>
> "Of course, if you are not satisfied that the man knew what he was doing, if you are not satisfied that he knew the import of that waiver on March 7, 1951, he had a right to refuse on December 22, 1952, to give testimony which might incriminate him" (f. 602).

It is true that under Section 381, Penal Law he had to testify whether or not he had signed a waiver. But it was the dispute and doubt concerning the loss of petitioner's rights of immunity under the statute that brought about his silence. That silence has led to this judgment of conviction. Since there was a doubt and dispute concerning the effectiveness of the waiver it could not be said that the petitioner's actions were contumacious under Section 751, the Judiciary Law of New York. *People* v. *Hofsaes, supra.*

POINT IV

The alternatives presented to petitioner deprived him of his immunity against self-incrimination.

Although it was held in *Palko* v. *Connecticut,* 302 U. S. 319, that self-incrimination compelled by a State is not protected by the Federal Constitution, nevertheless, since that decision, and also prior thereto, it has been suggested that the privilege against such self-incrimination, is incorporated in the privileges and immunities clause and in the due process clauses of the Fourteenth Amendment. See, *Leyra* v. *Denno, supra,* Cf. *Irvine* v. *Calif.,* 98 L. ed. Adv. p. 324; *Wolf* v. *Colorado,* 338 U. S. 25; *Rochin* v. *Calif.,* 342 U. S. 165; *Adamson* v. *California,* 332 U. S. 46.

Since this case again presents the problem of self-incrimination to the Court, it is submitted that this is an occasion and opportunity for modifying the doctrine of the *Palko* case.

The self-incriminatory feature of this case hangs on the dilemma the petitioner found himself in of being required to testify or face this prosecution.

POINT V

The judgment of conviction should be reversed with directions that the indictment be dismissed.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York City 5

APPENDIX A

Memorandum of Appellate Division, 282 App. Div. 775.

"People, &c., res. v. Regan, ap—Defendant appeals from a judgment of the County Court, Kings County, convicting him of criminal contempt of court, and from 'each and every intermediary order therein made.' It was defendant's contention upon the trial that a waiver of immunity executed by him, prior to his appearing before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the district attorney had failed to advise him with respect to his rights. The question of whether defendant signed the waiver knowingly and fully aware of its import and consequences was submitted to the jury as a question of fact. Judgment unanimously affirmed. Assuming, without deciding, that the district attorney was under a duty to advise defendant of the nature and effect of the waiver of immunity and his rights with respect thereto, we are of the opinion that the proof established, beyond a reasonable doubt, that defendant had been so advised and had voluntarily and knowingly executed the waiver. Defendant's other contentions have been examined and are without merit. The minutes of the preliminary hearings, printed in the record, have not been considered in reaching this determination. No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction (Code of Criminal Procedure, Sec. 517)."

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IN THE

Supreme Court of the United States

October Term, 1954

DOCKET No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF NEW YORK

PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York 5, N. Y.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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IN THE

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DOCKET NO. 54

MICHAEL J. REGAN,

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THE PEOPLE OF THE STATE OF NEW YORK,

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ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT

(1)

Introduction

That the petitioner raised the question of the unconstitutional application of Section 903 of the New York City Charter appears in the narration of "questions raised" on page 2 of Petitioner's Brief, subdivision (c).

The Court of Appeals certified that Federal constitutional questions were raised and passed upon. Since the petitioner upon his refusal to testify raised the question of the deprivation of his immunity without due process of law, and his trial counsel continued with like objection,

including the contention that Section 903 worked an unlawful duress (R. 58, fol. 172; R. 161, R. 209) it is apparent that all subsidiary questions related thereto are embraced therein. The application for a Writ of Certiorari, page 4, subdivisions 2 and 3 broadly raised the question.

The Revised Rules now provide, Rule 40 (d) (1): "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

In this case, the question of the constitutional application of Section 903 to the petitioner is fairly embraced, because his argument below and in this Court is that it is part of a web of facts that has deprived him of due process. The unconstitutional application of 903 is a strand in that web.

The petitioner, in any event, argues in Petitioner's Brief, that irrespective of Section 903, the factual situation whereby petitioner was led to his predicament, through the doubt and uncertainty of his rights deprived him of due process.

(2)

As Applied in This Case, Considering All Factors, Section 903 Operated to Defeat a Valuable Constitutional Protection

The test of a statute is its operation and effect. *Near* v. *Minnesota,* 283 U. S. 697 at 708, bottom.

What was demanded from the petitioner is not merely that he testify. This demand could have been enforced by contempt proceedings. At that juncture the respondent would have had the testimony it sought, but the petitioner

would have had the immunity the statute provided him. (Section 381 of Penal Law.) The petitioner would then have been protected under the state constitutional and statutory guarantee against self-incrimination.

From the days of Liliburne's defiance and ordeal to this day, the right against self-incrimination has been recognized and honored. The events of current history have more than proved the worth of that shield. The contemporary rationale can even be improved upon. It is not only a protection against tyranny. It is a measure of security to the citizen in a cruel and hazardous world. The world he lives in is indeed bleak and grim. The dangers now attendant upon living in a world where the multitude of laws possible of transgression is counted in multiples of 100,000 (aside from the perils of the infinite catalog of diseases and accidents) warrants the conclusion that Schiller's poem on Hope was a paean on optimism. The ineluctable fact is that life today is grim and hazardous. The guarantee against self-incrimination protects the citizens in the form of an assertion to his possible prosecutor that he wants to be left alone, and that if a prosecutor has any charge against the citizen it is the prosecutor who must prove guilt by his own evidence. It is not for the citizen to convict and penalize himself. This is a measure of security in a very insecure world.

But the respondent was not satisfied that petitioner should furnish testimony and have his constitutional protection. It was insistent that he give up a constitutional protection.

To consider the problem in hand, of determining the reasonableness of Section 903 by its insistence upon a

waiver of immunity, it is necessary to make the distinction between (a) compelling the testimony and (b) demanding that a waiver of the constitutional guarantee be executed on the pain of forfeiture of livelihood.

This is not the case where a policeman invoked his constitutional protection, remained mute and lost his job. In that type of case it might be urged by some that while the policeman had his constitutional right to be silent, he, nevertheless, had no right to be a policeman, especially where the testimony related to his work as a policeman. Section 903 provides in part for that type of situation.

The instant case, however, deals with that part of Section 903 which says that if the public employee "shall refuse to waive immunity from prosecution on account of *any matter* in relation to which he may be asked to testify upon any such hearing or inquiry, his * * * employment shall terminate."

This part of the statute does not seek his testimony. This part does not automatically cancel his employment because of refusal to testify. This part squarely demands that the employee give up his constitutional right against self-incrimination concerning "*any matter* (not merely concerning *his* work) (Ex. 2R 145).

The converse of this demonstrates that it is not his silence that is punished. It is his refusal to waive immunity that is punished. If he forfeited his constitutional immunity it follows conversely that he could still remain employed as a policeman.

From the foregoing, it is clear that what was sought from petitioner is that he give up his constitutional protection against self-incrimination.

This, petitioner submits was an unreasonable demand and an unreasonable condition of his employment.

The choice given to petitioner was in reality no choice. It was an illusory choice. It was the "free" choice that it was once said, borrowers had in contracting with usurers.

It was pointed out in Petitioner's Brief that the force of *Garner* v. *Board of Public Works*, 341 U. S. 716; *Wieman* v. *Updegraff*, 344 U. S. 183; *Adler* v. *Board of Education*, 342 U. S. 485, have impliedly cast off the troublesome dictum of the *McAuliffe* case that public employment does not carry the protections afforded by the Federal Constitution.

It is submitted that since such employments carry constitutional protections, it follows that petitioner can invoke constitutional guarantees to protect him from unconstitutional conditions of his employment.

In another context, where pecuniary rights alone were at stake, this Court, denied the right of a state to require the surrender of a constitutional right as a condition of the exercise of a privilege. In *Frost et al.* v. *Railroad Commission of the State of California*, 271 U. S. 583, the statute required that auto transportation companies had to obtain a permit to operate. In addition, it required a certificate of public convenience and necessity be obtained for the exercise of the privilege of transportation. The effect of the statute was to require a private carrier to dedicate his business to public use as a condition of using the highways. This Court held the requirement to be an unconstitutional condition of exercising a constitutional right.

This Court said in the *Frost* case:

> "May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so

carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." * * *

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it, upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is unconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

In this connection, it is noteworthy that in *Matter of Grae*, 282 N. Y. 428, at 433, it was held that the refusal by a lawyer to sign a waiver of immunity could not subject to disciplinary proceedings. He had a right, said the Court, to exercise his privilege against self-incrimination without penalty.

In *Ex-Parte Young*, 209 U. S. 123, 144 a claim was made by a utility company that penalties imposed for challenging

rates fixed was an imposition of an unconstitutional condition. The effect of the penalty would take away the freedom of asserting a constitutional right. This Court upheld that claim. See also, *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *Missouri* v. *Chicago, etc.*, 241 U. S. 533. The rationale behind these cases, which is applicable to the instant one, is that a person should not suffer a penalty for asserting a constitutional right. In those cases, the law in effect said, give up your right to challenge the law or be penalized. In this case, the Charter says, give up your constitutional protection against self-incrimination or else be penalized.

(3)

As stated by the writer upon the argument, the petitioner was granted Hobson's choice. It was illusory. Consequently, the demand upon him worked a duress which led to the chain of uncertainties and ultimately to his conviction for contempt.

The statute as applied to petitioner was unreasonable therefore, in a doublefold manner. First, it was unreasonable not because it insisted that he testify. It was unreasonable because it insisted that he renounce a constitutional protection to which all free men are entitled, be they employees of the municipality or otherwise.

Second, the statute was unreasonably applied in that it created an element of duress, the duress being the economic security of his employment.

To state, as respondent does that this requirement was a contractual obligation assumed upon employment begs the whole question. The question is: Is this condition

valid; is it a reasonable requirement of employment? Petitioner has already shown that it is an unreasonable and unconstitutional condition and requirement.

Even the citation by respondent (p. 13, Supplemental Brief) of Wigmore, *Evidence,* stands for what petitioner has urged, that duress in obtaining a waiver of the privilege against self-incrimination voids such waiver.

It migh also be noted parenthetically in connection with the respondent's stress that the statute is a term of contract,—that the Fifth Amendment and similar provisions against self-incrimination could be rendered nugatory. If all employers incorporated a clause in all employment contracts requiring such a waiver, then, if such clause were upheld as a reasonable condition of employment, little would be left of the protection against self-incrimination. This observation goes even farther than that expressed by Mr. Justice Black upon the argument of the consequences that would follow to all Federal employees if a similar provision were adopted by the Federal government.

(4)

In All Events, Contumaciousness Is the Crux of the Conviction

In the welter of the arguments in this case, it should not be forgotten that the petitioner was not convicted for bribery or gambling. He was convicted for being in contempt. Contempt implies contumaciousness. From the record in this case it cannot be said that this petitioner was contumacious. At best, it can be said that he refused to testify because his constitutional rights were endangered.

At worst, it can be said that there was doubt and confusion as to what his rights were. But in no sense was he contumacious.

If there is any question that petitioner's doubts and uncertainties were genuine, the answer is found on pages 14 to 18 of Supplemental Brief of Respondent, for indeed those pages are a glaring example of the uncertainties and doubts that were petitioner's. If the complex and elaborate statement there made is essential to explain why petitioner should have testified it illustrates how uncertain petitioner was. How could it therefore be said that he was contemptuous? Must a citizen be placed in jeopardy of being held in contempt when clarity of law is lacking, and moreover, when clarity must be labored even by the District Attorney?

(5)

Petitioner Will Be Required to Testify, Absent the Waiver of Immunity

At the argument the question was posed,—What would happen if the Court should strike down the waiver? The answer is that under the statute, the petitioner would be required to testify. But he would still possess his constitutional protection against self-incrimination. Thus, the respondent would have the testimony it seeks, but the petitioner would retain his constitutional safeguard. Also—the petitioner's rights and obligations would stand clear, unclouded by the doubts and uncertainties, that brought about his conviction for contempt.

(6)

CONCLUSION

The Judgment of Conviction Should Be Reversed

Dated: New York, N. Y.
December 10, 1954

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Petitioner
60 Wall Street
New York 5, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 54

MICHAEL J. REGAN

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

AARON E. KOOTA
Assistant District Attorney
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. 730

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to review a judgment of a state court of last resort, the New York Court of Appeals, rendered March 12, 1954, affirming the conviction of petitioner for the crime of criminal contempt of court.

The indictment and subsequent judgment are posited upon a New York statute which declares that the contumacious and unlawful refusal of a witness to answer any legal and proper interrogatory constitutes the crime of criminal contempt (New York Penal Law, Section 600).

Questions Presented

1. Where by statute in New York a witness is accorded complete immunity against criminal prosecution in exchange for his testimony before a Grand Jury, does compulsion to testify nevertheless constitute a denial of due process within the intendment of the Fourteenth Amendment to the Constitution of the United States?

2. Was the execution by petitioner of the formal waiver of the benefits of the immunity statute attended by such circumstances as to constitute a denial of due process under said amendment?

Record Facts

Petitioner was duly indicted by Grand Jury of the County of Kings in the State of New York.

The Indictment

Prefatory averments recite the inauguration of the December 1949 Grand Jury and its various extensions to complete the unfinished business pending before it (20, 21).* The particular subject of inquiry on the occasion of petitioner's appearance before it as a witness was:

> "whether any plainclothes police officers of the City of New York, of whatever rank, who were charged with the specific duty of enforcing the laws against gambling and vice, had received bribes from book-

* Numerals refer to folios in the Record.

> makers and gamblers within the County of Kings; whether any of said police officers were protecting said bookmakers and gamblers within the County of Kings and for money or other consideration paid to said police were affording them immunity from detection, arrest and prosecution for violation of the laws against gambling and whether any of said police officers had financial assets or income which he could not account for, from legitimate sources" (22, 23).

It is then charged that prior to March, 1951, petitioner was a plainclothes police officer in the City of New York and had been assigned to duty as such to the office of the Police Commissioner (24).

On March 7, 1951, petitioner appeared as a witness before said Grand Jury and was duly sworn (24). His examination was adjourned to December 22, 1952, when the following legal and proper interrogatory was put to him (26):

> "Q. While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers."

It is then averred that petitioner "wilfully and unlawfully refused to answer said interrogatory and to testify" (26).

On January 5, 1953, a Judge of the County Court (Leibowitz, *J.*) upon application of the Grand Jury therefor duly made, directed petitioner to testify. However, recalled before the Grand Jury, he persisted in his refusal (27).

The indictment concludes with averments that the interrogatories propounded were "legal and proper" and charges petitioner with the crime of Criminal Contempt of Court (27-30).

The Evidence

It was developed through the People's witness, Mr. Koch, a civilian employee in the Office of the Clerk of the Police Department of New York City, that petitioner was appointed to the police force in 1942 (225). He resigned in October, 1947 but was readmitted in October, 1948 (228). During a substantial period of his tenure in the Police Department, he was assigned to duty as a plainclothesman, attached variously to Division Offices and to the Police Commissioner's plainclothes squad (225-228). On March 27, 1951, petitioner was "dropped from the rolls" of the Police Department (229).

Plainclothes squads are specifically enjoined to enforce laws against gambling (232). The jurisdiction of the Police Commissioner's plainclothes squad is city wide (233).

Petitioner's maximum gross annual salary as a plainclothesman was $4,150 (237).

It was stipulated that "the Grand Jury was duly organized, that it was duly in session at all times from December, 1949 to date, and that all of its actions were pursuant to law, functioning as a Grand Jury, and that there is no question being raised here or any technicality being raised here about the power of the Grand Jury to function as a Grand Jury pursuant to the order of the Court as filed with the Clerk of the Court" (244, 245).

Mr. Chadeayne, Foreman of the Grand Jury, testified that on March 7, 1951, petitioner appeared as a witness before that body and an oath was duly administered to him (249, 250).

Prior thereto, petitioner had executed and delivered a formal waiver of immunity (250). This waiver subsequently marked in evidence as People's Exhibit 2 (433) reads as follows (434-438):

"County Court, Kings County

The People of the State of New York

—against—

John Doe,

Defendant.

Waiver of Immunity

I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, Borough of Brooklyn—

• • • • •

of the City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry for legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(Signed) Michael J. Regan.

Witness:
Gerald V. Clarke

State of New York,
County of Kings, SS.:

On this 7th day of March, 1951, before me personally appeared Michael J. Regan, to me personally known and known to me to be the individual described in and who executed the above waiver, and duly acknowledged that he executed the same.

Richard Eric Alleyne,

* * * * *

Notary Public, Kings County."

On the appearance of March 7, 1951, a financial questionnaire was delivered to petitioner, a form of which was received in evidence as People's Exhibit 3 (261). He was instructed to answer the questions thereon contained and return the document completed on March 28, 1951 (329).

We have noted that on March 27, 1951, the day before his scheduled return to the Grand Jury, petitioner's association with the Police Department was severed (229).

The subsequent appearance of petitioner before the Grand Jury occurred on October 22, 1952 when he was given another form of questionnaire (261-263). He was instructed in the Grand Jury to complete and return it,

answered on November 12, 1952, to which he acquiesced (357).

On November 12, 1952, he reappeared before the Grand Jury (263). His questionnaire had not been completed and his examination was adjourned to afford him additional time pursuant to his request for that purpose (359, 360).

We now approach the immediate circumstances which culminated in this indictment.

On December 22, 1952, petitioner again appeared before the Grand Jury (267). He reaffirmed his prior execution of the waiver of immunity (364). He was then asked:

> "While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers".

to which he stated his desire to read his statement to the Grand Jury. The statement thus read, follows (365-367):

> "Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.
>
> I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

> I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such".

It will be marked that despite his prior appearances before the Grand Jury, this was the first time that petitioner declined to testify or alleged a privilege against self-incrimination or disavowed the waiver of immunity which had been executed by him some eighteen months earlier (406-408).

It was stipulated upon the trial as follows:

Upon petitioner's refusal to testify, on December 22, 1952, an application was immediately made in open Court before Judge Leibowitz to overrule his objection and direct him to testify. A hearing was thereupon held at which petitioner appeared in person and by Mr. Hellenbrand, an attorney who represented him on the trial of this indictment (380). The hearing was not completed on December 22, 1952 and was adjourned to January 5, 1953, when it was continued. Upon the completion thereof, Judge Leibowitz overruled petitioner's objections, held that the waiver of immunity was effective and binding upon him

and directed him to return to the Grand Jury and testify (380-382).

The stenographic minutes of the proceedings in open court before Judge Leibowitz on December 22, 1952 and January 5, 1953, were marked for identification as People's Exhibits 5 and 4 respectively (301, 298). These exhibits were proffered in evidence, but the offer was not pressed in view of the subsequent stipulation of petitioner hereinabove described (376-382).

Mr. Chadeayne testified and it was conceded by appellant that on the occasion of the latter's appearance before it, the Grand Jury was investigating "whether any of these policemen had swollen bank accounts and swollen assets which could be traced to the graft that was allegedly being passed by the bookmakers to the police, so that the bookmakers would have protection and carry on their business without interruption by the police". Petitioner agreed that the Grand Jury had a "right to investigate that" (273). The questions put to him were relevant and not "in the wild air" (291).

On January 5, 1953, after Judge Leibowitz had directed petitioner to testify, he reappeared before the Grand Jury immediately (390). The following questions were then put to him to which he replied (391-397):

> "Q. Mr. Regan, this morning you appeared before County Judge Leibowitz, did you not? A. I did.
>
> Q. There was a hearing conducted before County Judge Leibowitz concerning a statement made by you on your appearance on December 22, 1952 with respect to your testifying? A. That's right.
>
> Q. Did Judge Leibowitz direct you to return to

this Grand Jury and answer all legal and appropriate interrogatories? A. He did.

Q. Did he tell you, in words or substance, that he overruled your claim that your waiver of immunity was not effective and that when you testified you would have to testify under a valid, effective and legal waiver of immunity? A. He did.

Q. Now, you have been recalled to this Grand Jury, have you not? A. Yes, sir.

Q. This proceeding before Judge Leibowitz was about a half hour ago, was it not? A. That's correct.

Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers? A. I'd like to read a statement at this time.

Q. Well, first, will you answer the question or do you refuse to answer? A. I refuse to answer the question.

Q. Now, read it slowly and loudly. A. (Reading):

Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.

I claim my constitutional and statutory privileges and immunities.

It is claimed that I signed a waiver of immunity before this body sometime in March of 1951 and that this waiver remains effective and I must testify without any immunity that I would otherwise have. I claim that this waiver is not effective because I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not afforded an opportunity to employ counsel and that I was not advised by anyone that I did not have to sign a waiver nor at the time of the execution of

this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I claim my Constitutional rights were not properly safeguarded or explained to me and that there is a doubt and uncertainty concerning my status as a witness and my privileges and duties as such.

Q. Does that conclude your statement? A. It does.

Q. Mr. Regan, you were a police officer for nine years before you retired or resigned? A. Yes, sir.

Q. Were you in plainclothes during that period? A. Part of the time; yes, sir.

Q. How long were you a plainclothesman? A. In all, I'd say approximately two years."

The chronology of petitioner's appearances before the Grand Jury and the Court and the folio references where the minutes thereof are printed *in extenso* are as follows:

March 7, 1951, Exhibit 6, Record, page 109

October 22, 1952, Exhibit 7, Record, page 119

November 12, 1952, Exhibit 8, Record, page 120

December 22, 1952, Exhibit 9, Record, page 121

January 5, 1953, Exhibit 10, Record, page 130.

The Defense

Petitioner did not testify in his own behalf. He called as his sole witness Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.

The waiver of immunity was read by petitioner before he signed it (492). Mr. Clarke, stated that he was familiar

with the procedure and practice of summoning witnesses before the Grand Jury (449). He was the individual who had requested petitioner to execute the waiver (449). The waiver was signed in an anteroom adjacent to the Grand Jury, in which were contained a desk and bench (470, 471). The room was crowded at one time and there might have been thirty-five or twenty-five men present when the waiver was signed (477). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (480, 490). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (482). He advised petitioner "as to what this Grand Jury was concerned with" at or before he signed the waiver (485), and that "if he is going to be put in the Grand Jury he must sign the waiver" (488).

Twenty-five minutes were consumed by the thirty-five men in executing their respective waivers, all in the immediate presence of Mr. Clarke, including petitioner (491, 492). *The latter called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it* (501, 502).

On March 7, 1951, the treatment of petitioner in the anteroom was the same as was accorded to the other patrolmen who were executing waivers (432).

Of utmost significance is an event which transpired immediately after petitioner executed the waiver. He was ushered into the Grand Jury room where he was questioned as follows (People's Exhibit 6, 327 *et seq.*):

"*By Mr. Clarke*:

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

"Waiver of immunity referred to received in evidence and marked People's Exhibit 317, of this date.

"(Witness was thereupon sworn.)"

ARGUMENT

POINT I

New York Statute Law accorded petitioner adequate immunity against prosecution in return for his testimony before the Grand Jury. By his execution of the waiver of immunity, petitioner voluntarily relinquished the benefits which these immunity statutes accorded him. There was no denial of due process.

We shall assume, *arguendo*, that the due process clause in the Fourteenth Amendment is applicable to the state procedures evidenced in this record. The query then is suggested, upon the facts at bar was due process denied to petitioner? We think not. Petitioner's refusal to testify

before the Grand Jury was without warrant in law. Any testimony which might have been elicited from him could not have been self-incriminatory because he had been granted complete statutory immunity from criminal prosecution. When petitioner appeared before the Grand Jury, that body was investigating into the possible commission of the crimes of Conspiracy (New York Penal Law, Section 580, *et seq.*), Gambling (New York Penal Law, Section 970, *et seq.*) and Bribery and Corruption (New York Penal Law, Section 370). At that time,* these statutes (Gambling, Section 996, Conspiracy, Section 584, Bribery, Section 381) provided that no person should be excused from testifying, but in the event he does

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial."

These immunity statutes are coextensive with the constitutional guarantee against self-incrimination and therefore supplant the privilege incorporated in the Constitution of the United States as well as that of New York (Article 1, Section 6).

> *Counselman* v. *Hitchcock*, 142 U. S. 547;
> *Brown v. Walker*, 161 U. S. 591;
> *Glickstein* v. *U. S.*, 222 U. S. 139, 141;
> *Matter of Doyle*, 257 N. Y. 244;

* These statutes have since been amended to define the method by which immunity could be obtained (Laws of New York, 1953, Chapter 891, effective September 1, 1953).

Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983.

What effect did the execution of the formal waiver of immunity have upon the rights of petitioner? The Gambling, Conspiracy and Bribery statutes of New York in destroying petitioner's privilege against self-incrimination expressly substituted equivalent benefits therefor, *i.e.*, that the testimony which might be elicited from him would not be used against him in any proceeding and that he would not be prosecuted criminally for any matter which his testimony might disclose. The formal document executed by petitioner entitled "Waiver of Immunity" by its terms simply waived the benefits which these immunity statutes conferred upon him. However, this waiver of the benefits did not operate retrospectively to restore the privilege against self-incrimination which the Gambling, Conspiracy and Bribery statutes had previously destroyed by the grant of immunity.

We perceive no merit, therefore, in petitioner's contention (brief, page 17) that New York had denied him immunity for incriminating answers.

POINT II

The execution of the waiver of immunity did not deprive petitioner of due process.

In his Point II, petitioner urges that he was denied due process in his execution of the waiver of immunity. We think this contention is specious. Petitioner, a policeman,

was a public officer and employee of the City of New York. The New York State Constitution, Article 1, Section 6, provides *inter alia*:

> "providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Section 903 of the Charter of the City of New York provides in part:

> "If any * * * officer or employee of the City shall * * * wilfully refuse or fail to appear before any court * * * or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the City * * * or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant and he shall not be eligible to election or appointment to any office or employment under the City or any agency."

Certainly these provisions do not constitute *legal* duress of the petitioner. There is no evidence in the record before this Court and no *express* assertion by petitioner that his

act in executing the waiver was induced by the supervening duress of the statute. But even if petitioner signed the waiver through fear of losing his office as a police officer, it would not constitute duress cognizable in law. His act was voluntary. Legal duress connotes wrongful or venal conduct by a contracting party exerted against another. (Restatement of Law of Contracts, Section 493, cited with approval in *Williston, on Contracts*, Revised Ed., Vol. V, page 4497). In *Deshong* v. *City of New York*, 176 N. Y., 475, 479, the Court said:

> "Payment coerced by duress or unlawful compulsion may be recovered back. The coercion however, must be illegal, unjust or oppressive."

Williston, *supra*, at page 4500 says:

> "One element of the early law of duress continues to exist, however its boundaries may be otherwise extended. The pressure must be wrongful and not all pressure is wrongful."

At bar, petitioner was confronted with the alternative of forfeiting his office or executing the waiver. No wrongful pressure was exercised by the statute or the constitution. He could have refused to execute the document and have instituted legal proceedings to contest the forfeiture of his office. In such event no legal duress could be posited.

> *Board of Trustees* v. *O. D. Wilson Co.*, 133 Fed. 2nd, 399.

Petitioner's further contention as to the effectiveness *in futuro* of the waiver of immunity (brief, pages 15, 16) is untenable.

The charge of the trial court, to which no exception was taken, that the waiver of immunity continued effective throughout the entire investigation by the Grand Jury established the law of this case and precludes petitioner's present contention. At folios 600 through 602, the Court instructed the jury as follows:

> "If an effective waiver was signed by him, if he knew full well what he was doing when he went into the Grand Jury room in March of 1951, that waiver was good for all time thereafter. Is that simple English, Mr. Foreman and gentlemen? He did not have to be asked to sign a waiver each time he appeared before the Grand Jury, just as long as the life of that Grand Jury continued and they were 'attending to their knitting,' as set forth in the order of the Court, that waiver was effective. That should settle the point in your mind that may arise in your discussion in the jury room. Once the waiver is signed, provided it is an effective waiver, that waiver continues during the life of that Grand Jury. If the waiver was effective in March of 1951; if he knew what he was doing when he signed that waiver and also if he knew the import of it, as it is claimed by the prosecution in this case, if you are so satisfied beyond a reasonable doubt, he had no right to refuse to testify in December of 1952."

There was no exception to this charge and we think that the law of the case was thereby established.

N. Y. Code of Criminal Procedure, Sec. 420-a.

At page 16 of his brief, petitioner urges that he was denied the right to counsel when he executed the waiver of immunity and before the Grand Jury. It is true that

he was not represented by counsel, but the record at bar does not disclose that he was *denied* the right thereto. There is no evidence that he had ever invoked that right, if indeed such right existed at all (cf. *In Re Black*, 47 Fed. 2nd 542).

Petitioner argues that he had no understanding of his rights at the time he executed the waiver of immunity. This statement is purely gratuitous and finds no support in the record at bar. He did not testify at the trial. The question whether he signed the waiver knowingly and fully aware of its import and significance was submitted to the trial jury as a question of fact which was resolved against him.

CONCLUSION

The arguments which petitioner advances to invoke jurisdiction are not embraced within the "character of reasons" suggested in Rule 38 of the Revised Rules of this Court, and we urge therefore that

The petition should be denied.

Dated, Brooklyn, New York
May 10, 1954.

Respectfully submitted,

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

AARON E. KOOTA
Assistant District Attorney
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1954

DOCKET No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

SUPPLEMENTAL BRIEF FOR RESPONDENT

EDWARD S. SILVER
District Attorney
Kings County, New York
Attorney for Respondent

On the Brief:

EDWARD S. SILVER,
District Attorney

JULIUS HELFAND,
AARON E. KOOTA,
JEROME C. DITORE,
Assistant District Attorneys

32 CAMP PRESS, 30 Lerry Street, N. Y. C.—COrtlandt 7-0484-0485

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Introduction

With leave of the Court, granted upon the argument of this appeal, we submit this supplemental brief on behalf of the State of New York.

Our discussion is limited to the validity of Section 903 of the New York City Charter and its impact upon the facts and circumstances disclosed in this record.

In limine, we emphasize that Section 903 was not specifically challenged by petitioner in any proceeding in the State courts and is therefore not cognizable *sub judice.*

In *Whitney* v. *California*, 274 U. S. 357, the resident power of review in this Court was limited not only to the deprivation of a federal right but "to the particular claims duly made below and denied" (p. 380).

Accord:

Beauharnais v. *Illinois*, 343 U. S. 250;
Adler v. *Board of Education*, 342 U. S. 485, 496;
Barsky v. *Board of Regents*, 347 U. S. 442, 456;
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sections 66, 77, 79.

The contention advanced by petitioner upon oral argument that the statute as applied to the facts at bar is repugnant to his rights, constitutionally guaranteed, does not draw in question the validity of the enactment.

Robertson and Kirkham, ibid., page 26;
Charleston Federal Savings and Loan Assn. v. *Alderson*, 324 U. S. 182, 184-187;
Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. 1, 4-6.

We stress with equal resolution the proposition that infringement of the privilege against self-incrimination in a state court is not interdicted by the Due Process clause of the Fourteenth Amendment. Not only that privilege *per se*, but all incidents and ancillary aspects thereof, such as waiver or abandonment of immunity, similarly do not posit a federal question.

Adamson v. *California*, 332 U. S. 46;
Twining v. *New Jersey*, 211 U. S. 78;
Palko v. *Connecticut*, 302 U. S. 319.

These prefatory observations made, we proceed to the problem at hand.

POINT I

Section 903 of the New York City Charter is a valid exercise of government prerogative and legislative power.

The New York City Charter Revision Commission pursuant to Chapter 867 of the Laws of 1934, proposed a new and comprehensive charter for the conduct of the City of New York. It was adopted by referendum on November 3, 1936 and became effective January 1, 1938. Section 903 thereof provides:

> "Sec. 903 *Failure to testify*—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

The cardinal objective of this statute is to facilitate a grand jury inquiry into the administration of public

office and official behavior. An investigation could be frustrated or seriously impeded, absent testimony of the officer himself. A witness' reliance upon his constitutional privileges could effectively bar access to this avenue. Therefore, the legislature imposed liability to forfeiture of office to insure a broader and more comprehensive scope of grand jury investigation.

It is not a capricious or arbitrary parade of legislative authority. It promulgates a fair and reasonable standard of public employment, calculated to accomplish a beneficent, communal purpose. A municipal employer may properly inquire "of its employees as to matters that may prove relevant to their fitness and suitability for the public service" (*Garner* v. *Los Angeles Board of Public Works,* 341 U. S. 716, 720). The scope of inquiry under Section 903 and the conduct demanded of a city employee is restricted and defined in narrow terms. His account is expressly limited to his *official* conduct. There is no encroachment upon his private life, nor is he compelled to reveal activity unrelated to the discharge of the duties of his office.

A disclosure unaccompanied by the sanction of punishment for revealed criminal misconduct would be woefully ineffectual. Hence the statute requires of city employees that they waive immunity from prosecution in accounting for official conduct before a grand jury or other legally constituted investigative body.

The penalty imposed by the enactment for refusal to execute a waiver is forfeiture of office and ineligibility to future public employment.

We urge that Section 903 is a reasonable declaration of a sensible and intelligent civic purpose. A police officer is specifically enjoined to enforce laws against gambling. His city employer calls upon him to reveal whether in the discharge of his duties, he had accepted bribes to permit gamblers to ply their illegal trade without molestation. He refuses to account unless the city promises in advance that he will not be prosecuted for disclosing that he had received graft. Could anyone reasonably deny the municipality the right to dismiss that police official under these circumstances? This is the sole purport and operative effect of Section 903. The city is empowered to forfeit the office of its employee who refuses to account before a grand jury under a waiver of immunity. Assertion that Section 903 violates a constitutional mandate is to reject the prerogative of a city to discharge a faithless, disloyal and criminal employee and to affirm his vested right to continued employment. *O tempora! O mores!*, that would tolerate or accept a result so maleficent.

In *McCauliffe* v. *New Bedford*, 155 Mass. 216, Mr. Justice Holmes enunciated a classic principle in sustaining the right of a municipality to discharge a police officer for engaging in proscribed political activity. At page 220 he said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

Mr. Justice Douglas speaks of the "pernicious implication" of the foregoing dictum in *McCauliffe* anent the constitutional right to public office (*Barsky* v. *Board of Regents*, 347 U. S. 442, 472). We respectfully urge that the denial of vested right to *public* employment does not connote that a "man has no constitutional right to work" and that adherence to the former principle would not render the latter inevitable. A dichotomy of employment into "private" and "public" suggests reasonable and intelligent distinctions between these categories. The differences are not obscure. To dilate upon them, we think, would be a work of supererogation. One vital phase of divergence lies in the area of influence of the disloyal employee. A recreant servant in private industry affects only the business of the individual employer. The faithless public servant disturbs the welfare of countless thousands.

The test of the validity of Section 903 of the New York City Charter is its reasonableness. In *Barsky, supra,* a New York law which authorized disciplinary action against a physician convicted in a court of competent jurisdiction of a crime "meets the charge of unreasonableness" (p. 452). Laws imposing pledges of fealty as a condition of public employment have been sustained against constitutional attack.

In *Garner* v. *Los Angeles Board of Public Works, supra,* the city had established as a qualification of employment a pledge of loyalty to the state and the United States. Said this Court at pages 720 and 721:

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal

> service . . . the amendment was reasonably designed to protect the integrity and competency of the service . . . The Charter amendment defined standards of eligibility of employees and specifically denied city employment to those persons who thereafter should not comply with these standards."

Mr. Justice Frankfurter concurring and dissenting in part in *Garner* said at pages 724, 725:

> "The Constitution does not guarantee public employment. City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs."

At bar, Section 903 "in the context of our time" is "sufficiently relevant to effective and dependable government and to the confidence of the electorate in its government" (*Garner*, p. 725).

In *Canteline* v. *McClellan*, 282 N. Y. 166, the Court of Appeals in New York sustained the validity of a provision in Article 1 Section 6 of the State Constitution requiring public officers to execute waivers of immunity when testifying as to official conduct before a grand jury.

This Court in *Adler* v. *Board of Education*, *supra*, speaking of persons employed in public schools of the State of New York, said (342 U. S. at 492):

> "It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York."

Of course, we do not urge "the facile generalization that there is no constitutionally protected right to public employment" (Mr. Justice Clark in *Wieman* v. *Updegraff*, 344 U. S. 183, 191).

We regard as a truism that "unreasonable discrimination, if avowed in formal law, would not survive constitutional challenge" (Mr. Justice Frankfurter in *Garner, supra*, at 725). But the egis of the Federal Constitution does not envelop the public servant unless the statutory definition of the requisites of office are "patently arbitrary or discriminatory" (*Wieman, supra*, at 192).

It is our conviction that Section 903 of the New York City Charter, which sanctions the discharge of a public employee who refuses to account for his official activities unless guaranteed immunity from prosecution, suffers no greater constitutional infirmity than a statute permitting the discharge of a public servant who advocates the overthrow of our government by force and violence or for engaging in proscribed political activity. Each is "reasonably designed to protect the integrity and competency of the service." The statute is reasonable because it is fit and appropriate to the end in view.

> *Parkes* v. *Judge of Recorder's Court*, 236 Mich. 460, 210 N. W. 492, 494.

Petitioner's contention that Section 903, *ex proprio vigore*, exerts wrongful compulsion in contravention of the due process clause in the Fourteenth Amendment, should be rejected.

POINT II

The application of New York City Charter Section 903 to the petitioner upon the specific circumstances disclosed in this record did not deprive him of due process or any constitutional privilege.

Petitioner argued upon this appeal that the collective factors evinced in this record, including the alleged coercive effect of Section 903 and the procedure in the execution of the waiver of immunity encroached upon the rights guaranteed to him under the due process clause of the Fourteenth Amendment.

If the statute is a valid exercise of legislative authority, duress, as a cognizable, legal or equitable defense, cannot be predicated upon it, since the pressure would not be wrongful.

It has been suggested that petitioner was confronted with an intolerable dilemma on January 5, 1953, when he was directed by the County Court to testify before the Grand Jury under an effective waiver of immunity.*

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* The waiver recites that it is executed pursuant to New York Penal Law Section 2446 (R. 145, fol. 435). Section 2446 reads:

"Sec. 2446. Waiver of immunity.

If it be provided by this chapter or any other general or special law that a person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, or that testimony so given or produced shall not be received against him upon any criminal investigation, prosecution or proceeding, such person may execute, acknowledge and file in the office of the county clerk a statement expressly waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such

Truthful testimony might indicate bribery; false evidence would invite perjury prosecution; refusal to testify would subject petitioner to punishment for contempt. Any course he pursued, inevitably would lead to prison. This quandary in which petitioner contends he was placed constituted, he argues, denial of due process.

Refutation is readily at hand. The status of any person who waives the benefits of immunity statutes under any circumstances would be identical with petitioner's. Every executor of a waiver of immunity *ipso facto* is confronted with the possibility of prosecution for the substantive crime (bribery, larceny, homicide, as the case may be), if he testifies truthfully; perjury for false testimony and criminal contempt for deliberate refusal to testify. If such an impasse would validly support a claim of invasion of constitutional rights, then no waiver of immunity could ever withstand attack. In effect, the benefits of an immunity statute could never expressly, legally be waived, thus doing violence to the universally accepted principle that privilege against self-incrimination or the correlative benefits conferred by a statute which destroys or supplants the privilege (at bar, New York Penal Law Sections 996, 584, 381) may be relinquished, abandoned or waived.

Wigmore in his monumental tome on Evidence, 3rd Edition, Volume 8, Section 2275 at page 435, says of the privilege against self incrimination that "It has never

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evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such person shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

been doubted that the privilege like all privileges . . . is in itself *waivable*". To the same effect:

> *Brown* v. *Walker*, 161 U. S. 591, 597;
> *Report, Law Revision Commission of the State of New York*, 1942, page 373.

If appellant voluntarily, consciously and intelligently waived the benefits of the immunity conferred upon him by the foregoing sections of the New York Penal Law, he should not now be heard to complain of the consequences or that they were more onerous than he might have anticipated. *Volenti non fit injuria.*

We are then to return to the basic question whether the effect of Section 903 of the City Charter in conjunction with the other attendant circumstances disclosed in the record operated to deprive petitioner of conscious choice and illegally coerced him into executing the waiver and whether, thereby, due process was denied to him.

We iterate the objection urged in our main brief that the record does not reveal the profession of that claim in any prior proceeding in the state courts and in addition, that there is no record evidence to support such claim if it be deemed asserted. We do not imply that the only acceptable evidence could emanate from petitioner himself. We do contend, however, that at least the attendant circumstances should clearly manifest and ineluctably support a conclusion that the waiver resulted from oppression. No such irresistible inference can be adduced here.

Implicit in the verdict of guilt based upon the evidence and the law as charged by the Court is the finding by the jury that petitioner, consciously, intelligently, intention-

ally and with full comprehension of the risk invited, waived the benefits conferred upon him by the immunity statutes. Discussing "coercion" a savant in the law said:

> "Freedom, however, is a matter of degree and it is no easy task to define the boundary line that must be recognized by a rational system of law. We can only say generally, that there must be such liberty of choice as to create a reasonable presumption that the party exercising it has chosen that which he desires, and not merely submitted to that which he cannot avoid."
>
> *Salmond, Jurisprudence,* 7th Ed. page 371.

Of course, the word "desires" in this reference is not to be equated with "palatable" or "pleasing". Petitioner chose to execute the waiver. He preferred and desired that course to the one which would forfeit his office as a policeman.

Unlike the tests imposed as a condition of employment in *Garner, Adler* and other loyalty oath cases where the statute was enacted *after* tenure in office had attached, at bar, Section 903 of the New York City Charter was formulated in 1938, whereas petitioner entered the Police Department in 1942 (R. 75, fol. 225). He commenced employment with knowledge that one of the conditions of continuance in office was that he waive immunity when called upon to account for his official conduct before a grand jury. This statutory condition is the legal equivalent of a proviso contained in an express written contract between petitioner and the City of New York, were such contract formalized. The consideration therefor was acceptance by

the City of petitioner as a police officer. In effect, when petitioner was appointed to the police force, he agreed to execute a waiver of immunity in a proper investigation or surrender his status as a member of the Police Department.

It was maintained upon this appeal that the County Court afforded petitioner only an illusory choice, "Where to elect there is but one, 'tis Hobson's choice,—take that or none". Whether he would testify truthfully, falsely or not at all, his decision, petitioner argued, would lead inevitably to jail. But when the Judge of the County Court directed petitioner to testify under a valid waiver or be punished, he did not impose any new or added condition that defendant should testify or be imprisoned for refusal or be prosecuted if he confessed to a crime. The Judge was simply defining and clarifying an obligation which petitioner had *previously* voluntarily and intelligently assumed, the waiver of immunity. The proceedings before the County Court on December 22, 1952, and January 5, 1953, were to determine whether petitioner was required to testify under a waiver and to clarify, not to create, his status (R. 127-130, fol. 383).

It is said that the privilege against self-incrimination may be waived by contract or other binding pledge before trial and that it is irrevocable unless the circumstances bring it within the doctrine of duress or oppression and is therefore voidable on customary principles of contract.

Wigmore, Evidence, *supra,* Vol. VIII, page 435.

The course of our argument now leads to discussion of the operative extent of the waiver in point of time. It was

suggested upon this appeal that petitioner in executing the waiver of immunity had *forever* relinquished his rights.* Opprobrium is attached to this incident of the waiver. Assuming, *arguendo*, that the waiver did operate indefinitely in the future, we do not believe that thereby a Federal question is raised. If petitioner intentionally and knowingly executed the document and was not compelled to do so by circumstances which the law recognizes as duress, wherein was he denied any right or privilege "implicit in the concept of ordered liberty"?

At any rate, treatment of the prospective effect of the waiver and its duration requires analysis of the concept of relinquishing rights forever. The term "forever" is susceptible of dual connotation. It may imply:

1. That petitioner waived the benefits of the immunity statutes for any crime which he might commit *after* the delivery of the waiver, which construction might pose grave constitutional questions; or

2. That he waived forever all immunity from prosecution as to *past* offenses, a version not repugnant to due process.

Clearly the waiver did not apply to future offenses. Petitioner did not agree to submit to prosecution for crimes he might commit after the execution of the waiver. The document at bar is not reasonably subject to that interpretation. The New York statutes of bribery, conspiracy and gambling accord immunity from prosecution to any witness called in a grand jury investigation into those crimes for all *past* offenses of whatever nature, when

---

* Petitioner executed the waiver of immunity on March 7, 1951. Contempt was committed in December, 1952 and January, 1953.

his testimony is responsive to relevant interrogation (*United States* v. *Kohriger*, 345 U. S. 22, 32). The immunity statutes do not promise a witness that he will not be prosecuted for crimes he may commit at any time in the future. It is this immunity from prosecution for *past* offenses and only this which the statutes accorded petitioner. It is this and only this immunity which he waived by executing the document at bar. In the first sense of our interpretation, petitioner's waiver was not effective forever.

The second connotation of waiving freedom from prosecution to which we have alluded, is that petitioner surrendered forever his right not to be prosecuted for *past* offenses. We observe no constitutional debility in this aspect.

Petitioner agreed in the waiver of immunity that if he were ever indicted for any past offense which he might disclose to the Grand Jury or to which his testimony might furnish a link, *he would not urge as a defense* to such prosecution that the indictment was illegal because the state had promised him immunity in exchange for his testimony and that the indictment was a breach of that guarantee and his privilege against self-incrimination. Absent the waiver of immunity, petitioner could not be prosecuted in the future because the grand jury investigation, in which he had been compelled to testify, concerned crimes as to which the Penal Law of New York accorded him security against indictment. Petitioner relinquished these prospective benefits by the execution of the waiver. He abandoned a contingent defense in advance. This was the limit and the total operative area of that instrument.

It is to be noted that he did not thereby relinquish or promise to forego any other defense available to him in such future prosecution. Despite the waiver, he could plead as a defense to prosecution, the Statute of Limitations, alibi or any other circumstances legally recognized as a defense in any prosecution which is not affected by a waiver of immunity. For all practical purposes, petitioner's waiver was effective for any period of time short of the Statute of Limitations, but not forever. We do not discern the virus of unconstitutionality in the foregoing analysis or interpretation of the waiver of immunity.

However, we do not believe that any fixed, artificial period of time should be the conclusive criteria upon which the validity of a waiver is made to depend. No intelligent standard of time could be established. Would a waiver be valid if it is effective for one day, one week, one month, one year, but constitutionally deficient if it is deemed valid for two days, two weeks, two months or two years? Why should the mere fact that some twenty-two months elapsed between the execution of his waiver and petitioner's refusal to testify vitiate his relinquishment of benefits conferred by the immunity statutes? Logic and reason reject the element of time as an acceptable measure of the validity of the waiver.

We suggest a different criterion, which, we believe, is realistic and intelligible. That is, *the duration or course of the judicial investigation.* At bar, the grand jury was inquiring into bribery of police officials by gamblers (R. 91). It commenced this investigation in December, 1949 and it was still continued by the same grand jury into January, 1953, when petitioner refused to testify (R. 81-

83). Petitioner's waiver was effective continually during the course of the same investigation in which he was originally called to testify. Differently expressed, once petitioner executed the waiver, then, whenever he testified (here twenty-two months later), whenever he disclosed criminal activity, he waived immunity from prosecution on account thereof, provided the testimony adduced was before the same grand jury conducting the same inquiry. Those are the circumstances at bar and that is the logical, sensible standard for appraisal of the prospective effectiveness of the waiver. A different estimate would invite the absurd conclusion that a witness before a grand jury, conducting an investigation two days in duration, but testifying on four different occasions in that period, would be required to execute four waivers. Our conviction that a waiver is effective for the entire course of a particular investigation is supported by respectable authority.

People ex rel. Hofsaes v. *Warden of City Prison,* 302 N. Y. 403;
People v. *Cassidy,* 213 N. Y. 388;
Report, Law Revision Commission of the State of New York, 1942, page 373.

What legal efficacy the waiver of immunity in the form signed by petitioner would possess, if he were compelled to testify before another grand jury conducting an independent investigation into totally different or unrelated matters, presents an abstract proposition which this Court is not now called upon to appraise.

At bar, petitioner's delivery of the waiver and subsequent refusal to testify occurred before the same December, 1949, Grand Jury, conducting the very inquiry into

official, police corruption. We perceive no denial of fundamental rights or basic principles of justice in holding petitioner to his waiver despite the length of time intervening between its execution and his failure to testify. The County Court was correct in its determination that the waiver then and there and in that proceeding was effective and petitioner's refusal to comply with its directive and to testify constituted punishable contempt under New York Penal Law, Section 600.

We maintain that this record does not evince any invasion of petitioner's constitutional rights because of, either, the intrinsic nature of the waiver or the mechanics of its execution.

It is regrettable that the idea of due process is not susceptible of precise delineation. Text and decisional authority have imparted to the concept of due process an accordion-like quality, expanding and contracting as the exigencies of particular facts may require, according to the pragmatical notions of decent behavior and "fundamental fairness" which an individual judge may entertain. Perhaps in this elasticity, in this singular adaptive capacity, is the genius in our system of law manifest.

We urge that whatever the proper norm of conduct to be applied to the facts and circumstances *sub judice*, petitioner was not denied due process or deprived of any constitutional right or privilege.

CONCLUSION

The judgment of conviction should be affirmed.

Dated, Brooklyn, New York
November, 1954

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County, New York
Attorney for Respondent

On the Brief:

EDWARD S. SILVER,
District Attorney

JULIUS HELFAND,
AARON E. KOOTA,
JEROME C. DITORE,
Assistant District Attorneys

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Argued by
AARON E. KOTA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF NEW YORK

BRIEF FOR RESPONDENT

EDWARD S. SILVER
District Attorney
Kings County, New York
Attorney for Respondent
Municipal Building
Brooklyn, N. Y.

32 CASE PRESS, 30 Forty Street, N. Y. C.—COrtlandt 7-0484-0485

The chronology of petitioner's appearances before the Grand Jury and the Court and the page references where the minutes thereof were offered in evidence and are printed *in extenso* follow:

March 7, 1951, Exhibit 6, R. 107, 109
October 22, 1952, Exhibit 7, R. 117, 119
November 12, 1952, Exhibit 8, R. 117, 120
December 22, 1952, Exhibit 9, R. 117, 121
January 5, 1953, Exhibit 10, R. 118, 130.

The Defense

Petitioner did not testify in his own behalf. He called, as his sole witness, Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.

Mr. Clarke's version of the circumstances surrounding the execution of the waiver of immunity looms large on the horizon of petitioner's contentions in this Court. We think therefore that his testimony requires particular analysis:

The waiver of immunity was read by petitioner before he signed it (R. 164). Part of it is in his own hand (R. 140). It was executed in an anteroom adjacent to the Grand Jury, in which were contained a desk and bench (R. 157). The room was crowded at one time and there might have been thirty-five or twenty-five men, all police, no civilians. When the waiver was signed, "they were going in and out" (R. 159). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (R. 160, 164). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (R. 172). He advised petitioner

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"I said, (to petitioner) 'If you do not sign this waiver of immunity and if you are put into the Grand Jury then by the District Attorney, anything you testify could not be used against you.' I said, 'Under the Penal Law and under the City Charter, being you are a city employee, the same as I am or the same as anybody else in the Department of Sanitation or Fire Department, you are requested, if the District Attorney sees fit, to sign such a waiver and to testify before the Grand Jury. Now,' I said, '*We are not forcing you to sign this waiver if you don't want to sign it.* In your case we will report the fact to the Police Commissioner, and if we report the fact to the Police Commissioner that you refused to sign a waiver of immunity and testify before the Grand Jury, in that case you will possibly lose your job, because under the City Charter you have to sign such a waiver.' I also told him that this testimony could be used during the life of the Grand Jury by the District Attorney or by the Grand Jurors themselves" (R. 172). (Emphasis supplied.)

Of utmost significance is an event which transpired immediately after petitioner executed the waiver. He was ushered into the Grand Jury room where he was questioned as follows (People's Exhibit 6, R. 107, 109):

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

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"Waiver of immunity referred to received in evidence and marked People's Exhibt 317, of this date.

"(Witness was thereupon sworn.)"

POINT I

Petitioner in none of the state courts suggested duress perforce Section 903, New York City Charter, in the execution of his waiver of immunity. This contention urged initially before this Court should be rejected.

Woven throughout petitioner's argument is the skein of *force majeure;* "the waiver of immunity was compelled by Section 903, New York City Charter" (brief, Point I). Section 903 declares the employment of a city servant *ipso facto* forfeited upon his refusal to waive immunity from prosecution when summoned to testify before a Grand Jury concerning the property, government or affairs of the City.

Neither at the trial of this indictment nor in either of the appellate tribunals of New York was this contention urged by petitioner.

1. Petitioner's contentions at the trial.

Before the trial court and jury, petitioner's theory pursued the following course:

When he executed the waiver of immunity, he did not know what he was doing and did not understand the document. Assistant District Attorney Clarke, who supervised the execution was under some duty of explaining the sig-

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nificance of the waiver to him, in the discharge of which, Mr. Clarke was derelict. The waiver, therefore, was not binding upon him. Judge Leibowitz improperly ruled that he must testify under a valid waiver of immunity and consequently his refusal to comply therewith cannot be considered legally as a contempt of court.

At the opening of the trial, petitioner moved to dismiss the indictment upon the ground that he had been directed to answer questions under an effective waiver of immunity, which he contended was improper since the District Attorney had not advised him of his right not to sign the waiver and that he was not aware of the "meaning" and "magnitude" of this waiver (R. 57, 58). Again at Record, 147, the conclusion of the People's case, the motion to dismiss the indictment was posited upon the contention that the People had failed affirmatively to show that they had advised petitioner prior to the execution of the waiver of his constitutional rights and the fact that he did not have to sign it. Further in the course of the trial at Record 96 and 97, the following transpired:

> "The Court: Mr. Hellenbrand concedes that. There is only one main issue that he raises in this case. He said that the man signed a waiver of immunity but he did not know what he was signing; he did not have full appreciation of what he was signing and that, therefore, the waiver was inactive and inoperative and that therefore, if he was compelled to testify on the basis of that waiver, his constitutional rights were being violated; is that not right?
>
> Mr. Hellenbrand: That is not what I say, Judge. That is part of what I say.
>
> The Court: All right.

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Mr. Hellenbrand: I say one other thing, that there was an affirmative duty of the prosecuting attorneys—

The Court: That is part of the question as to whether the waiver was operative.

Mr. Hellenbrand: Because I said to your Honor that even if Mr. Regan understood it, which I am not conceding, but even if he understood it, it was the affirmative duty of the District Attorney to tell him.

The Court: That is your contention.

Mr. Hellenbrand: That is my contention."

Petitioner's position was iterated in the charge of the Court at Record, 199, to which no exception was noted, as follows:

"The issue has been clarified in this case through the talents of these fine lawyers before this Court. When a man signs something, he must know what he is signing. Otherwise, the signature is ineffectual. He must have a conscious understanding of what he is signing. The People are in duty bound, on all of the facts and circumstances, to establish that this defendant knew full well what he was signing when he signed the waiver; that he knew full well the implications involved in signing the waiver."

And again at Record, 200 the Court instructed the jury:

"It is for you to say whether or not he knew what he was signing and knew the full import of what he was signing. That seems to be the 'bone of contention,' the issue in this case. It is very strenuously contested by both sides."

That this was petitioner's contention was emphasized in the opinion of the Appellate Division affirming the judgment of conviction (282 App. Div. 775) as follows:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

BRIEF FOR RESPONDENT

Statement

An order filed herein on June 7, 1954, granting his application for writ of certiorari (347 U. S. 1010), brings to this Court for review a judgment convicting petitioner of the Crime of Criminal Contempt of Court.

The judgment was entered in the County Court of Kings County, State of New York, the court of original jurisdiction, on April 9, 1953. It was unanimously sustained in an intermediate appellate tribunal (282 App. Div. N. Y. 775),

and again unanimously affirmed in the Court of Appeals, the state court of last resort in New York (306 N. Y. 747).

Petitioner was convicted by the verdict of a jury predicated upon an indictment which accused him of the contumacious and unlawful refusal to answer a legal and proper interrogatory propounded to him as a witness before a duly constituted Grand Jury. This conduct is declared to be a misdemeanor (New York Penal Law, Section 600). The indictment is set forth in this record at pages 7 through 10.

Record Facts Material to the Questions Presented

Petitioner was a police officer in the Police Department of the City of New York, having been appointed in 1942 (R. 75). During a substantial period of his tenure in the Police Department, he was assigned to duty as a plainclotheman, attached variously to Division Offices and to the Police Commissioner's plainclothes squad (R. 75, 76). On March 27, 1951, petitioner was "dropped from the rolls" of the Police Department (R. 77).

Plainclothes squads are specifically enjoined to enforce laws against gambling (R. 78).

On March 7, 1951, petitioner appeared as a witness before a Grand Jury in the County of Kings, State of New York, where an oath was duly administered to him (R. 83, 84). It was conceded that said Grand Jury was duly constituted and functioning in that capacity (R. 82).

Prior thereto, petitioner had executed and delivered a formal waiver of immunity (R. 84). This waiver subsequently marked in evidence reads as follows (Peo. Ex. 2; R. 145, 146):

"It was defendant's contention upon the trial that a waiver of immunity executed by him prior to his appearance before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the District Attorney had failed to advise him of his rights."

2. Petitioner's contentions in the Appellate Division.

At pages 3 and 4 of petitioner's brief in the Appellate Division on his initial appeal from the judgment of conviction herein, he stated:

"The appellant contends as follows:

1. That the record of the trial indicates that the appellant was not made aware of his constitutional privileges and rights in connection with the execution of the waiver of immunity and that there was no conscientious effort on the part of the prosecuting officers to explain to this appellant his constitutional right to refuse to sign such a waiver of immunity, as well as the meaning and significance thereof. Accordingly, the appellant urges that the direction of Judge Leibowitz that defendant-appellant give answers under an 'effective waiver of immunity' was error. Further, appellant urges substantial error in the court's charge to the jury in refusing to charge that the witness must be 'made aware' of his rights before he is asked to sign a waiver of immunity (fol. 626). Further, error was made in the court's charge in refusing to charge that the District Attorney must make a conscientious effort to advise a witness with respect to his rights prior to the execution of a waiver of immunity (fol. 627).

2. That the appellant signed the waiver of immunity under instructions from the District Attorney

"County Court, Kings County

The People of the State of New York

—against—

John Doe,

Defendant.

Waiver of Immunity

I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, Borough of Brooklyn—

* * * * *

of the City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry for (*sic*) legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(Signed) Michael J. Regan.

Witness:
Gerald V. Clarke—"

tantamount to a direction to sign a waiver of immunity.

3. That the inflammatory remarks of the District Attorney at summation precluded a fair and impartial trial.

4. That until the determination of the rights of the appellant, there could be and was no criminal contempt of court."

It is significant that in the Appellate Division not only did petitioner fail to claim duress by Section 903 of the City Charter, but indeed no constitutional question of any nature was presented.

3. Petitioner's contentions in the Court of Appeals.

The Court of Appeals amended the remittitur to certify that upon that appeal petitioner's contention, that he was denied due process and his constitutional privileges and immunities under the Fourteenth Amendment, was passed upon and rejected (306 N. Y. 875). The order of amendment was not accompanied by any opinion. We think, therefore, that this record and briefs may be searched to ascertain the *specific* respects in which petitioner before the Court of Appeals claimed that his constitutional rights had been abridged. At pages 6 and 7 of his brief in the Court of Appeals, petitioner stated the issues presented to that Court thus:

"Two issues of law, preserved by appropriate objections and exceptions of appellant below, are presented on this appeal: (1) Whether appellant, against whom a grand jury investigation is concededly being directed, may lawfully refuse to answer questions concerning his commission of a series of felonies, notwithstanding his execution of a waiver

The subsequent appearance of petitioner before the Grand Jury occurred on October 22, 1952, when a form of financial questionnaire was delivered to him (R. 88). He was instructed to return it, answered, on November 12, 1952, to which he acquiesced (R. 119).

On November 12, 1952, he reappeared before the Grand Jury (R. 88). His questionnaire had not been completed and his examination was adjourned to afford him additional time pursuant to his request (R. 120).

We now approach the immediate circumstances which culminated in this indictment.

On December 22, 1952 petition again appeared before the Grand Jury (R. 89).* He reaffirmed his prior execution of the waiver of immunity. He was then asked (R. 122):

> "While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers."

In reply petitioner stated his desire to read a statement to the Grand Jury. The statement thus read, follows (R. 122, 123):

> "Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.
>
> I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.

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* Petitioner's assertion that he was arrested (brief p. 7) finds no support in this record.

> of immunity some twenty-two months previously, at a time when he was not interrogated and had no reason to believe that the investigation was directed against him; and (2) Whether, upon indictment and trial for such refusal to answer, failure of the trial judge to leave the elemental issue of fact of appellant's alleged contumacity to the jury, as requested by appellant, errors in the conduct of the trial and sentencing the appellant, do not at the very minimum require reversal of the conviction and a new trial."

In Point III of his brief in the Court of Appeals, petitioner contended that his conviction violated the due process and privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution. This argument was predicated not on the theory of duress, but upon the suggested privilege against self-incrimination, "liberty of silence" and "right of privacy".

It is evident that in no proceeding in the state courts did petitioner claim that his waiver of immunity was coerced by the City Charter.* Where a Federal Constitutional question was intimated, it was posited not upon the theory of duress, but rather the violation of the privilege against self-incrimination.

As a matter of principle, the belated contention of duress should be repudiated. Immanent in the concept of justice is orderly judicial procedure. The practice of urging one claim in the court of original jurisdiction and different contentions in successive appellate courts, inspired by nothing more persuasive than the naive hope that somewhere, some argument will capture the judicial imagina-

* Indeed, even in the petition for the writ of certiorari *sub judice* this contention is not squarely presented.

I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such."

It will be marked that despite his prior appearances before the Grand Jury, this was the first time that petitioner declined to testify or alleged a privilege against self-incrimination or disavowed the waiver of immunity which had been executed by him some eighteen months earlier (R. 136).

It was stipulated upon the trial as follows (R. 127-130):

Upon petitioner's refusal to testify, on December 22, 1952, an application was immediately made in open court before Judge Leibowitz to overrule his objection and direct him to testify. A plenary hearing was subsequently held on January 5, 1953, at which petitioner appeared in person

tion, should be discouraged. The trial court did not submit the issue of duress to the jury. Despite numerous requests for additional instructions to the jury, petitioner did not solicit a charge on the subject of duress (R. 207-212). Thus, neither the trial jury nor the state courts of original jurisdiction or review passed upon any issue of duress. The vigor with which this claim is now pressed upon this Court can hardly be reconciled with petitioner's failure to urge it as a defense in any of the proceedings below. It is clearly an afterthought.

We respectfully suggest that both on principle and on law, this Court should reject a contention of duress.

> *Whitney* v. *California*, 47 S. Ct. 641, 71 L. Ed. 1095; 274 U. S. 357, 362, 363;
> *Wilson* v. *Cook*, 66 S. Ct. 663; 327 U. S. 474, 483; 90 L. Ed. 793;
> *Bothwell* v. *Buckbee Mears Co.*, 48 S. Ct. 124; 275 U. S. 274, 279; 72 L. Ed. 277;
> *Adler* v. *Board of Education*, 342 U. S. 485, 496; 72 S. Ct. 380; 96 L. Ed. 517.

In *Beauharnais* v. *Illinois*, 343 U. S. 250; 72 S. Ct. 725; 96 L. Ed. 919, at pages 264 and 265, it is said:

> "Neither by proffer of evidence, requests for instructions, nor motion before or after verdict did the defendant seek to justify his utterance as 'fair comment' or as privileged. Nor has the defendant urged as a ground for reversing his conviction in this Court that his opportunity to make those defenses was denied below. And so, whether a prosecution for libel of a racial or religious group is unconstitutionally invalid where the State did deny the defendant such opportunities is not before us * * *. The benefits of hypothetical defenses, never raised below

and by an attorney who likewise represented him on the trial of this indictment. Upon the completion thereof, Judge Leibowitz overruled petitioner's objections, held that the waiver of immunity was effective and binding upon him and directed him to return to the Grand Jury and testify.

It was conceded by petitioner that on the occasion of his appearance before it, the Grand Jury was investigating "whether any of these policemen had swollen bank accounts and swollen assets which could be traced to the graft that was allegedly being passed by the bookmakers to the police, so that the bookmakers would have protection and carry on their business without interruption by the police" (R. 91). Petitioner agreed that the Grand Jury had a "right to investigate that" (R. 91). The questions put to him were relevant and not "in the wild air" (R. 97).

Petitioner reappeared before the Grand Jury (R. 130). The following questions were then put to him to which he replied (R. 131, 132):

> "Q. Mr. Regan, this morning you appeared before County Judge Leibowitz, did you not? A. I did.
>
> Q. There was a hearing conducted before County Judge Leibowitz concerning a statement made by you on your appearance on December 22, 1952 with respect to your testifying? A. That's right.
>
> Q. Did Judge Leibowitz direct you to return to this Grand Jury and answer all legal and appropriate interrogatories? A. He did.
>
> Q. Did he tell you, in words or substance, that he overruled your claim that your waiver of immunity was not effective and that when you testified you would have to testify under a valid, effective and legal waiver of immunity? A. He did.

> or pressed upon us, are not to be invoked in the abstract."

This Court has enunciated a pertinent and applicable principle that state autonomy in law enforcement is not to be eroded through indefinite charges of unconstitutional action.

> *Brown* v. *Allen*, 73 S. Ct. 397, 437; 344 U. S. 443; 97 L. Ed. 469.

POINT II

There is no evidence in this record that petitioner executed the waiver of immunity under the duress of Section 903 of the New York City Charter.

Whether or not this Court may search the record to ascertain if the specific *claim* now pressed upon it was presented to any State court, certainly it is not foreclosed from such scrutiny to determine whether it contains any cognizable *evidence* to support that claim. We urge that there is no record *evidence* that petitioner executed the waiver perforce the City Charter provision. Williston in his work on "Contracts" (Rev. Ed. 1936, Vol. 5, p. 4497), states that before a transaction may be avoided on account of duress "it must appear that the consent of the party seeking to avoid the transaction was coerced. That is, that he was actually induced by the duress * * * to give his consent and would not have done so otherwise".

Petitioner did not testify in his own behalf at the trial or on the preliminary hearing before Judge Leibowitz. On two occasions, subsequent to the execution of his waiver, petitioner appeared before the Grand Jury, represented

Q. Now, you have been recalled to this Grand Jury, have you not? A. Yes, sir.

* * * * *

Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers? A. I'd like to read a statement at this time.

Q. Well, first, will you answer the question or do you refuse to answer? A. I refuse to answer the question.

Q. Now, read it slowly and loudly. A. (Reading.)

Upon the advice of my counsel I decline to testify on the ground that my testimony right tend to incriminate me and subject me to other penalties.

I claim my constitutional and statutory privileges and immunities.

It is claimed that I signed a waiver of immunity before this body sometime in March of 1951 and that this waiver remains effective and I must testify without any immunity that I would otherwise have. I claim that this waiver is not effective because I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not afforded an opportunity to employ counsel and that I was not advised by anyone that I did not have to sign a waiver nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I claim my Constitutional rights were not properly safeguarded or explained to me and that there is a doubt and uncertainty concerning my status as a witness and my privileges and duties as such.

Q. Does that conclude your statement? A. It does.

* * * * *"

by counsel, and stated the basis of his refusal to testify. Never did he say that he executed the waiver because of the supervening duress of the City Charter. Petitioner was the sole repository of knowledge as to his reasons for signing the waiver. On the record *sub judice*, these reasons are the subject only of speculation and conjecture. Argument of his counsel in a brief to this Court that the waiver was executed perforce the statute, is but a gratuitous assumption, where *petitioner* did not assert the coercive force of the statute as the reason.

The pertinent record discloses simply the physical fact that a waiver of immunity was executed. The New York City Charter declares forfeit the office of an employee who refuses to sign such a waiver. It does not follow as a matter of common sense and logic that on those facts alone the waiver was delivered *because of the* statute. There is no evidence in this record of any imperative relation between these two established factors. There is testimony by Assistant District Attorney Clarke that petitioner's refusal to sign the waiver would invite notification thereof to the Police Commissioner, but the record does not disclose that this was the inducing cause of the waiver. *Non constat*, petitioner executed the waiver inspired by a conviction that he had committed no offense, had nothing to conceal or by the desire to surround his conduct with the aura of honesty and moral rectitude.

This Court is now requested to *presume* from the naked co-existence of the waiver and the provision in the City Charter, that the former was inexorably induced by the latter. We do not believe it consonant with accepted judicial procedure to posit a reversal of a state judicial determination upon tenuous inference.

"as to what this Grand Jury was concerned with" at or before he signed the waiver (R. 162), and that "if he is going to be put in the Grand Jury he must sign the waiver" (R. 163).

Twenty-five minutes were consumed by the thirty-five men, including petitioner in executing their respective waivers all in the immediate presence of Mr. Clarke (R. 164). *The former called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it* (R. 167, 168).

Mr. Clarke advised petitioner that by reason of his signing the document, he waived all immunity which petitioner would otherwise have from indictment, prosecution, punishment, penalty or forfeiture within the scope of the Grand Jury investigation, or in any other investigation or other proceedings before any judge, court or tribunal (R. 167). Mr. Clarke explained everything on the waiver to petitioner who read it and said that he understood it (R. 168). Mr. Clarke told appellant that whatever he testified to in the Grand Jury could be used against him by said jury or the District Attorney, and that when he signed the waiver and was subsequently prosecuted, the waiver would be effective even in such prosecution (R. 168). Mr. Clarke also advised petitioner that the testimony he gave before the Grand Jury could be used against him at any trial, or form the basis of an indictment (R. 170, 171).

At the hearing before Judge Leibowitz on January 5, 1953, Mr. Clarke testified:

Petitioner suggests that the fact of thirty-five police officers executing waivers within twenty-five minutes constitutes a "pattern of duress" (brief, p. 13). We reply that there is no *evidence* in this record that petitioner's volition and freedom of choice were overpowered by those circumstances.

At pages 8 and 9 of his brief, petitioner stresses the statement of the District Attorney to the jury in summation anent the dilemma in which he was placed, *viz.*, to be prosecuted for bribery, perjury or contempt. The inference is made that this record evidences inevitable prosecution for one of those crimes. We submit, however, that his argument completely distorts the object of the prosecutor's remarks. Petitioner's quotation of the summation contained at pages 8 and 9 of his brief is isolated and divorced from the surrounding text. An examination of the summation at Record, 178 and 179 commencing particularly at folio 534 indicates that the prosecutor was arguing to the jury the probable motive underlying petitioner's refusal to answer, to indicate that it was deliberate and calculated. In substance, the prosecutor reasoned that petitioner, *in his own mind*, was confronted with the three alternatives of prosecution and the least dangerous or serious was to remain mute and incur citation for contempt, a misdemeanor, comparatively less serious crime than the felonies of bribery and perjury. However, this record contains no evidence that the District Attorney had any proof against petitioner of bribery or of perjury. Contrary to petitioner's argument, there is no evidence that prosecution was inevitable regardless of the nature of his answer to the Grand Jury's question or of his refusal to reply.

POINT III

Duress cannot be predicated upon Section 903 of the New York City Charter as a matter of law.

Petitioner has launched a flank attack upon the constitutionality of the City Charter section. The record does not disclose that the constitutionality of the statute was directly challenged in any of the lower courts (*McGoldrick* v. *Compagnia Generale*, 309 U. S. 430, 434, 435; 60 S. Ct. 670; 84 L. Ed. 849). By its provision, a City employee must account for his official conduct in a Grand Jury investigation under a waiver of immunity or forfeit his employment. He is not compelled to answer for any activity beyond his official duties. The impact of the statute does not extend beyond the reasonable requirement that public employees should account for their conduct in the discharge of official duty. It is no more repugnant to due process than a statute compelling public officials to take a non-communist oath. *In Garner* v. *Board of Public Works*, 71 S. Ct. 909; 95 L. Ed. 1317; 341 U. S. 716, involving such loyalty oath, this Court said at page 720:

> "We think that a municipal employer is not disabled * * * from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

And at page 721:

> "the statute was reasonably designed to protect the integrity and competency of the service * * *. The Charter amendment defined standards of eligibility for employees and specifically denied City employment to those persons who thereafter should not

> comply with these standards * * * from its effective date it terminated any privilege to work for the City in the case of persons who thereafter engaged in the activity proscribed."

To the same effect is *Adler* v. *Board of Education of the City of New York, supra,* p. 17.

If Section 903, New York City Charter is a valid and reasonable regulation, no claim of duress may be posited upon it. Legal duress, cognizable in law, connotes wrongful or venal conduct by a contracting party exerted against another. (Restatement of Law of Contracts, Section 492, cited with approval in *Williston, on Contracts*, Revised Ed., Vol. V, p. 4497.) In *Deshong* v. *City of New York,* 176 N. Y. 475, 479, the Court said:

> "Payment coerced by duress or unlawful compulsion may be recovered back. The coercion, however, must be illegal, unjust or oppressive."

Williston, *supra,* at page 4500 declares:

> "One element of the early law of duress continues to exist, however its boundaries may be otherwise extended. The pressure must be wrongful and not all pressure is wrongful."

At bar, petitioner was confronted with the alternative of forfeiting his office or executing the waiver. No wrongful pressure was exercised by the statute. He could have refused to execute the document and have instituted legal proceedings to contest the forfeiture of his office.

> *Board of Trustees* v. *O. D. Wilson Co.,* 133 Fed. 2nd, 399.

POINT IV

Petitioner's contention that he did not understand the waiver is untenable. It was resolved against him by the jury, whose verdict on conflicting evidence should not be disturbed.

There is competent evidence in this record that petitioner did understand the contents of the waiver of immunity (R. 162, 163, 164, 167, 168, 170, 171, 172, 107, 109). Contrary evidence is discovered only in two statements made by the petitioner to the Grand Jury (R. 122, 123; 131 132). The trial court instructed the jury "that even though the defendant stated before the Grand Jury that he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it" (R. 211 fol. 633; 212 fol. 634; also R. 199 at fol. 597). Petitioner now invites this Court to breach the classic barriers that separate the functions of the court and jury, and to conclude that his statements are to be accepted as a matter of law.

Since the facts were in dispute, we respectfully suggest that this tribunal should accept the verdict that petitioner did comprehend the meaning and nature of the waiver. In *Lyons* v. *Oklahoma*, 64 S. Ct. 1208; 88 L. Ed. 1481; 322 U. S. 596 at 603, it is said:

> "To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike."

And in *Great Northern Railway Co.* v. *Donaldson*, 38 S. Ct. 236; 62 L. Ed. 616; 246 U. S. 121, 124, we note that:

> "It is not the province of this Court to weigh conflicting evidence."

A plethora of authority precludes review in this Court of the finding of the state court and jury on conflicting evidence.

> *Lisenba* v. *California*, 314 U. S. 219, 238; 62 S. Ct. 280; 86 L. Ed. 166;
> *Chambers* v. *Florida*, 309 U. S. 227, 238; 60 S. Ct. 472; 84 L. Ed. 716;
> *Ashcroft* v. *Tennessee*, 322 U. S. 143, 153; 64 S. Ct. 921; 88 L. Ed. 1192;
> *Taylor* v. *Mississippi*, 319 U. S. 583; 63 S. Ct. 1200; 87 L. Ed. 1600.

Petitioner's argument that the verdict "does not foreclose this Court's inquiry into the legal conclusions" (brief, p. 14) is applicable only to instances where the facts are *not in dispute* (e.g., *Leyra* v. *Denno*, 347 U. S. 556, 558).

Petitioner argues in his *brief* that the circumstances of the execution of the waiver by him together with thirty-five police officers in twenty-five minutes in a crowded room establishes lack of understanding of that document. Apart from this *brief*, *petitioner* on none of his appearances before the Grand Jury assigned that reason. For aught indicated in the record, this was simply a phase of evidence, a casual incident in the history of the case, unrelated to and unsupported by petitioner's claim that it contributed to misunderstanding.

In appraising the validity of this contention, the personality of petitioner should not be ignored.* This Court, in determining whether a denial of or failure to provide counsel is repugnant to due process, has considered the individual defendant, his intelligence, experience and education. The problem has been resolved "case by case".

Betts v. *Brady*, 316 U. S. 455; 62 S. Ct. 1252; 86 L. Ed. 1595;
Bute v. *Illinois*, 333 U. S. 640; 68 S. Ct. 763; 92 L. Ed. 986;
Uveges v. *Pennsylvania*, 335 U. S. 437; 69 S. Ct. 184; 93 L. Ed. 127;
Quicksall v. *Michigan*, 339 U. S. 660; 70 S. Ct. 910; 94 L. Ed. 1188.

We are not dealing here with an uneducated, illiterate individual, foreign to our customs, suddenly enmeshed in a web of technical legal procedure and floundering in a morass of doubt and uncertainty. Petitioner is a mature, experienced police officer, a man of intelligence and education. Before the Grand Jury he iterated his comprehen-

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* The trial court charged this jury at record 199, 200, folios 597, 598:

"Gentlemen, you have to use your common sense, your intelligence. You have a right to take into account who and what this man was, in determining whether or not he knew what he was doing when he put his signature to this waiver. Certainly, you have a right to take that into account, whether or not this was some ignorant person, unfamiliar with our ways and courts, or was it, on the other hand, a person who could be reasonably expected to know what this was all about. I am not venturing any opinion on it; I am putting the question in an interrogatory form, and not in a rhetorical sense. Please do not misunderstand me. I say specifically to you that you have a right to consider who and what the individual was, with whom are we dealing here? That is common sense, is it not?"

sion of the waiver (R. 107, 139). He read the waiver and Mr. Clarke explained its significance to him (R. 167, 168); all this, before it was introduced before the Grand Jury. What more should the prosecutor have done? Petitioner, a seasoned police officer, worldly-wise, executed this waiver. It was explained to him. He testified under oath that he understood it. The Court charged the jury to acquit unless they found that petitioner knew that he could not be compelled to execute the waiver (R. 212, fol. 635). At Record, 209, folio 627, the Court instructed the jury that petitioner could waive his constitutional privileges "only if it appears that he was aware of its existence and the surrounding safeguards, and voluntarily and intelligently made the waiver". At Record 211, folio 633, the Court further advised the jury that "even though the defendant stated before the Grand Jury that he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it." We must assume that in reaching its verdict the jury gave full heed to the instructions of the Court upon that subject.

People v. *Guardino*, 286 N. Y. 132, 135;
Antonsen v. *Bay Ridge Savings Bank*, 292 N. Y. 143, 146.

The ingenuity of man has not devised a mechanism for probing the secret recesses of the mind. The Grand Jury and prosecuting officials took petitioner at his word that he understood the waiver and received it in evidence. Now, many months later, petitioner before the Grand Jury for the first time, disclaimed understanding, but did not attribute such failure of comprehension to the mechanics of the execution of the document.

How were the Grand Jury or prosecuting officials derelict in their duty? What is it that we failed to explain to petitioner? What is it that he did not understand? What precise advice should have been given to him? We search his brief in this Court for a cogent reply, but in vain. There is no evidence of shocking official misconduct or failure to observe the ordinary decencies of human behavior. In *Betts* v. *Brady, supra*, at page 462 of the U. S. report, this Court said:

> "Due process of law * * * formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

POINT V

Petitioner's contention that dubiety concerning the validity of the waiver excused his contempt is not reviewable in this Court.

The courts of New York of original and appellate jurisdiction have concluded that petitioner's guilt of criminal contempt has been established beyond a reasonable doubt. Implicit in this determination is a rejection of petitioner's plea that his purely subjective confusion justified the refusal to reply to the Grand Jury's interrogatory. We urge that this conclusion finds complete support in the record.

If, however, we assume it erroneous, *arguendo*, it is nevertheless not the subject of consideration in this Court. It is Hornbook law that the general power to review or check the decisions of a state court of last resort is not an integrant of Supreme Court jurisdiction. There is no constitutional right involved in an error of state law nor does the guarantee of due process assure immunity from judicial error.

Stein v. *New York*, 346 U. S. 156, 181; 73 S. Ct. 1077; L. Ed. 1522;
Gryger v. *Burke*, 334 U. S. 728; 68 S. Ct. 1256; 92 L. Ed. 1683;
Buchalter v. *New York*, 319 U. S. 427; 63 S. Ct. 1129; 87 L. Ed. 1492;
Harding v. *Illinois*, 196 U. S. 78, 83; 25 S. Ct. 176, 49 L. Ed. 394.

POINT VI

Petitioner's argument that he has been deprived illegally of his constitutional privilege against self-incrimination is untenable.

Whether the privilege against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution is embraced within the due process clause so that contravening state action is thereby interdicted is no longer a matter of philosophical abstraction. This Court has held:

1. This privilege vouchsafed in the Fifth Amendment is not applicable to state procedures.
2. The privilege is not an essential element in due process and is therefore not protected by the Fourteenth Amendment against state action.

Adamson v. *California*, 67 S. Ct. 1672; 91 L. Ed. 1903; 332 U. S. 46, concerned a California statute which permitted the failure of a defendant to explain evidence against him to be commented upon by counsel and considered by the court and jury. The validity of this statute was challenged under the due process clause of the Fourteenth Amendment as well as under the self-incrimination proviso of the Fifth Amendment. This Tribunal held that the defendant's rights under the Fifth Amendment had not been abridged because that amendment did not control state action, but was referable only to federal conduct. Also reaffirmed was the doctrine of *Twining* v. *New Jersey* (211 U. S. 78; 53 L. Ed. 97; 29 S. Ct. 14), and *Palko* v. *Connecticut* (302 U. S. 319; 82 L. Ed. 288; 58 S. Ct. 188), that exemption from compulsory self-incrimination in a state proceeding is not secured by any part of the Federal Constitution.

In *People* v. *Breslin*, 306 N. Y. 294, the defendant, a police officer, was convicted of the crime of criminal contempt of court for refusal to testify before the same Grand Jury as at bar. That case presented a fact situation similar to the instant, with the exception that Breslin had not executed a waiver of immunity. His refusal to testify was predicated upon the privilege against self-incrimination. On petition for certiorari to this Court, Breslin argued that his privilege in the state court was protected by the Federal Constitution. Certiorari was denied, *sub nom Breslin* v. *New York*, 347 U. S. 1014 (June 1954).

Whether this body of case law is now to be repudiated and the operative area of the Fifth Amendment extended to include state procedures (*Leyra* v. *Denno*, *supra*, foot-

note at p. 558) need not be determined on this review, for the reason, as we shall now evince, that petitioner's privilege against self-incrimination in fact has not been infringed.

Any testimony which might have been elicited from petitioner could not have been self-incriminatory because he had been granted complete statutory immunity from criminal prosecution. When petitioner appeared before the Grand Jury, that body was investigating into the possible commission of the crimes of Conspiracy (New York Penal Law, Section 580, *et seq.*), Gambling (New York Penal Law, Section 970, *et seq.*) and Bribery and Corruption (New York Penal Law, Section 370). At that time,* these statutes (Gambling, Section 996, Conspiracy, Section 584, Bribery, Section 381) provided that no person should be excused from testifying, but in the event he does, he shall not

> "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial."

These immunity statutes are coextensive with the constitutional guarantee against self-incrimination and therefore supplant the privilege incorporated in the Constitution of the United States as well as that of New York (Article 1, Section 6).

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* These statutes have since been amended to define the method by which immunity can be obtained (Laws of New York, 1953, Chapter 891, effective September 1, 1953).

Counselman v. *Hitchcock*, 142 U. S. 547; 12 S. Ct. 195; 35 L. Ed. 1110;
Brown v. *Walker*, 161 U. S. 591; 16 S. Ct. 644; 40 L. Ed. 819;
Glickstein v. *U. S.*, 222 U. S. 139, 141; 32 S. Ct. 71; 56 L. Ed. 128;
Matter of Doyle, 257 N. Y. 244;
Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983.

The New York statutes granted petitioner adequate and complete immunity from prosecution in exchange for his testimony before the Grand Jury.

Petitioner is in error when he states (brief, p. 6) that a question presented herein is:

> "2. Did the execution of a waiver of immunity by the petitioner under the circumstances of the facts of this case effectively waive his rights to be silent under the Federal Constitution?"

Petitioner did not waive this "rights to be silent". In the investigation by this Grand Jury, no right of silence existed. It was destroyed by the grant of immunity in the Gambling, Bribery and Conspiracy statutes of New York. Petitioner could not waive a right which he did not possess.

What he did relinquish under his waiver were the *benefits* which the cited immunity statutes conferred upon him in lieu of the annulled privilege against self-incrimination. These benefits so abandoned, as is manifest from a perusal of the waiver of immunity (R. 145, 146) consisted of the right not to be prosecuted for any crime which his testimony might disclose or to which it could furnish a link in a

chain of evidence, and of the right that his testimony should not be read against him in any criminal proceeding. The waiver of these benefits by petitioner did not operate retrospectively to restore the privilege against self-incrimination which had been destroyed by the immunity statutes. Thus, the question of the privilege is not before this Court, since, even if the waiver of immunity were declared a nullity, the right of silence nevertheless would not exist, having been withdrawn by statute.

At page 16 of his brief, petitioner says:

> "The self-incriminatory feature of this case hangs on the dilemma that petitioner found himself in of being required to testify or face this prosecution."

This predicament was more fanciful than real. There is no *evidence* in this record that inevitable prosecution confronted petitioner, as we have heretofore observed.

POINT VII

Upon this record, there is no evidence that any constitutional right, privilege or immunity of petitioner has been abridged. Proceedings in the state court resulting in the judgment in review were in conformity with accepted concepts of due process.

We acknowledge that the operative area of due process is not susceptible of precise delineation. This Court in *Rochin* v. *California*, 342 U. S. 165 at page 173, speaks of the general requirement

> "that states in prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'."

In *Lisenba* v. *California*, *supra*, 314 U. S. at 236, the Court said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

See also *Malinski* v. *New York*, 324 U. S. 401; 65 S. Ct. 781; 89 L. Ed. 1029; *Quicksall* v. *Michigan*, *supra*, p. 25.

Where the mechanics of prosecution in a state court degenerates into conduct which "shocks the conscience" (*Rochin*, *supra*, at p. 172) it will be condemned.

POINT I

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment calculated to assure honesty and loyalty in its employees.

1. Public employment in New York State offers advantages with concurrent obligations which distinguish it from private employment.

The Constitution of the State of New York provides that positions in the state and municipal service shall be filled on the basis of merit and fitness demonstrated by examination which, where practicable, is to be competitive (Art. V, § 6).

Implementing this constitutional mandate the New York State Legislature has promulgated a program whereby employees entering state or municipal service are assured continued employment provided they render good, loyal and faithful service. In order to guarantee this status the state has established by statute certain rights of tenure and protection against arbitrary dismissal, e.g., Civil Service Law § 22 (Cons. Laws, chap. 9); Education Law §§ 2573, 6206 (Cons. Laws, chap. 16); Administrative Code of the City of New York §§ 434a-14.0, 437a-12.0. It is thereby apparent that the state has created a status for its employees which is far more favorable than that enjoyed in private industry.

Concurrently and in order to protect the state from disloyal or dishonest employees the legislature has established certain requirements such as good character and moral fitness, to be met prior to employment, which exclude persons guilty of crimes, notoriously bad conduct

A fair appraisal of this record will disclose that petitioner was accorded fair and just treatment and an utter absence of conduct which "shocks the conscience".

This Court said in *Quicksall, supra*, U. S. report at page 665:

> "The record exacts the holding that the petitioner has failed to sustain the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as alone would justify this court to invalidate the sentence by reason of the Due Process Clause."

Implicit in any state judicial system, albeit subject to constitutional restriction, is the power to compel testimony. This Grand Jury, in hot pursuit of corruption in public office, sought disclosure of vital information from petitioner. We do not suggest, needless to say, that laudable motives justify invasion of historic individual rights, constitutionally secured. Conversely, the effective administration of criminal justice is in grave jeopardy when the conduct of its executors is subjected to tests of rigid, ultra-refined niceties.

> "Justice, though due the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament."
>
> *Snyder* v. *Commonwealth*, 291 U. S. 97, 122; 54 S. Ct. 330; 78 L. Ed. 674.

We respectfully urge that, upon this record, petitioner has not been deprived of any constitutional right, privilege or immunity.

or addicted to harmful habits (Civil Service Law § 14). Other requirements, if not complied with, terminate existing employment (New York City Charter §§ 887, 888, 895, 896, 901. For the convenience of the Court the full text of these sections is printed in Appendix A of this brief, pp. 17-18).

New York City Charter § 903 has for its purpose the assurance of the proper cooperation by a public employee in any proper inquiry by an authorized investigating body inquiring into matters affecting the City or the official conduct of the employee.

2. Historical background of Charter § 903.

Pertinent to a consideration of the constitutionality of New York City Charter § 903 is a brief review of the background and history of the section. The present Charter of the City of New York, including § 903, was enacted by the State Legislature as an "emergency" law pursuant to the Home Rule provisions of the New York State Constitution (Art. XII, § 2, amended and renumbered effective January 1, 1939 as Art. IX, § 11). The Charter was prepared by a Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and was submitted to the people at the 1936 general election. It became effective on January 1, 1938.

In large measure, the enactment of a new charter was the outgrowth of an investigation into alleged corruption in the government of New York City. As stated by Judge Seabury in his final report (*In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10):

> "My first and principal recommendation therefore is:

CONCLUSION

The judgment of conviction should be affirmed.

Dated, Brooklyn, New York
October, 1954

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County, New York
Attorney for Respondent

On this Brief:
EDWARD S. SILVER,
District Attorney
JULIUS HELFAND,
AARON E. KOOTA,
JEROME C. DITORE,
Assistant District Attorneys

"The Charter of The City of New York Should Be Revised in Certain Fundamental and Basic Respects Hereinafter Mentioned.

"The Joint Legislative Committee was constituted to investigate the affairs of the government of the City of New York. It was not designed to be a charter revision committee. As the work of the Committee progressed, it became apparent, however, that the defects in the government of the City of New York were not exclusively personal to its officials, but that the difficulty lay deeper. It became apparent that the very form and structure of the city government was in a large measure responsible for the opportunities for graft and corruption which were disclosed before the Committee."

The drafters of the City Charter, in the light of these recommendations, prepared Chapter 40, including § 903, which regulates the rights and corresponding obligations of the city's employees. The spectacle of City officers and employees resting on their constitutional right against self-incrimination and refusing to testify in the so-called Seabury investigation into alleged corruption in the City administration, highlighted the issue as to whether such officers or employees should retain their public employment. The disclosures of then existing corruption in the city government brought about a realization on the part of proponents of Charter reform and the general citizenry that public servants should not be permitted to remain on taxpayer-supported payrolls if they refused to testify fully before duly empowered investigating agencies, or refused to waive immunity from prosecution when testifying.

The state legislature believed that the loyalty owed by an employee to the state required full cooperation by such employee before any duly constituted governmental body

conducting an inquiry relating to the property, government or affairs of the City of New York, or the official conduct of its employees. Accordingly, the legislature enacted § 903 and established as a condition of continued employment the full cooperation of the employee in such an inquiry. The refusal on the basis of self-incrimination to discharge this duty operates as a self-executing severance from city service.

3. New York State Court of Appeals sanction of Charter § 903.

In *Matter of Daniman, et al.* v. *Board of Education,* 306 N. Y. 532 (1954), Jurisdictional Statement filed with this Court September 28, 1954, certain teachers in the employ of the Board of Education and the Board of Higher Education of the City of New York refused on the basis of self-incrimination to answer inquiries by the Internal Security Sub-Committee of the United States Senate Committee on the Judiciary as to Communist Party membership. The Boards of Education and of Higher Education, respectively, found that these teachers had vacated their positions by operation of § 903 of the New York City Charter.

One of the teachers employed by the Board of Higher Education, Harry Slochower, was represented by separate counsel. He alone urged in the state courts the unconstitutionality of Charter § 903 as violative of the Fourteenth Amendment. On October 5, 1954 he filed a notice of appeal to this Court.

The Court of Appeals of the State of New York, by a vote of four to three, found that the teachers had separated themselves from public service. In neither the opinion of the Court nor the dissent was any doubt expressed as to the fact that these teachers had enjoyed due process.

The dissent stemmed from the question of whether or not the State Legislature intended to have this section apply to New York City teachers or to a Congressional investigating body.

Speaking for the Court, Judge Conway said (p. 538):

> "Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221).

Judge Conway reaffirmed the well-established principle that, where a reasonable basis exists a public employee may, as a condition of employment, be required to forego some of the constitutional privileges enjoyed by workers in private industry. He cited (at pp. 538-539) the opinion of this Court in *Adler* v. *Board of Education*, 342 U. S. 485, 492:

> "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

The Court of Appeals was unanimous in its agreement that a query into past or present Communist Party mem-

bership is relevant to an inquiry into a teacher's official conduct (pp. 540-541).

4. This Court has sustained the right of the State to protect itself by promulgating reasonable conditions of employment.

This requirement that a public employee answer pertinent questions in a proper investigation is in essence the same as the ordinance of the City of Los Angeles whereby public employees were required to foreswear that they did not advocate the unlawful overthrow of the government by force and violence and that they were not members of an organization which to their knowledge advocated the unlawful overthrow of the government by force and violence. Any employee who would not take such an oath was thereby precluded from further public employment. The Los Angeles ordinance is obviously designed to assure to the state loyal employees. Similarly, § 903 of the New York City Charter is calculated to protect the city against dishonest or disloyal employees. The constitutionality of the Los Angeles ordinance was passed on by this Court in *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951). This Court said (p. 720):

> "The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 102-103 (1947), and a State is not without power to do as much."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 54

MICHAEL J. REGAN,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK

December 2, 1954.

ADRIAN P. BURKE,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
of Counsel.

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In disposing of the argument against the constitutionality of the Los Angeles ordinance on the claim that it was a Bill of Attainder, this Court further held (p.):

> "*Cummings* v. *Missouri*, 4 Wall. 277 (1867), and *Ex parte Garland*, 4 Wall. 333 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation have never been intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in *Garland's* case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' 4 Wall. at 379-380."

The Court distinguished the Los Angeles ordinance from the Congressional act found unconstitutional by this Court in *United States* v. *Lovett*, 328 U. S. 303, 316:

> "Unlike the provisions of the [Los Angeles] Charter and ordinance under which petitioners were removed, the statute in the *Lovett* case did not declare general and prospectively operative standards of qualification and eligibility for public employment. Rather, by its terms it prohibited any further payment of compensation to named individual employees. Under these circumstances, viewed against the legislative background, the statute was held to have imposed penalties without judicial trial."

From an examination of § 903 of the New York City Charter it is manifest that this section is not aimed at any specific individuals as in the *Lovett* case or a well-

defined class of individuals as in *Cummings* v. *Missouri*, 4 Wall. 277 (1866).

Prohibitions on the individual liberties of Federal employees, as distinguished from private citizens, were upheld by this Court in *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1945). This Court held constitutional the "Hatch Act" prohibiting Federal workers from engaging in partisan political activities. Mr. Justice Reed, writing the majorty opinion for this Court, said (pp. 102-103):

> "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

This same principle found its first and often quoted enunciation in the words of Mr. Justice Holmes in *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220:

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> "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

The petitioner has argued (Brief, pp. 10-11) that the principle enunciated in the *McAuliffe* case, *supra*, that a public employee such as a policeman may be asked as a condition of employment to forego certain constitutional rights which are enjoyed by private citizens, has been overruled by this Court in *Garner* v. *Los Angeles*, 341 U. S. 716 (1951) and *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). The *Garner* case, which we have discussed *supra*, clearly provides no support for the petitioner's contention but, on the contrary, gives clear recognition to the principle that the state may take reasonable steps to insure the loyalty of its employees.

It is true that in *Wieman* v. *Updegraff*, *supra*, this Court declared an Oklahoma statute as violative of due process where the public employee was required, with or without *scienter*, to swear that within five years prior thereto he had not been a member of an organization which had been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization. The extension by this Court of protection to a public servant from a statute which is patently arbitrary or discriminatory does not provide a basis for the contention that a state may not require a public employee to forego the

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privilege of hiding his dishonesty or disloyalty behind the constitutional privilege of self incrimination.

The same principle of legislative control and establishment of reasonable qualifications has been applied to professions so coupled with the public interest as to require licensing by the state. This Court had upheld the fixing of certain requirements for the continued practice of such professions as medicine in *Dent* v. *West Virginia*, 129 U. S. 114 (1889), wherein the standards for practice were elevated, and in *Hawker* v. *New York*, 170 U. S. 189 (1898), wherein a statute prohibited the practice of medicine by any person convicted of a felony. See also *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954).

When the New York State Legislature enacted New York City Charter § 903 it not only provided that a public employee who refused to cooperate, on the basis of self-incrimination, in effect resigned from public service, but also prescribed a sanction against further public employment of such an employee. It is not unreasonable for the state, in the selection of its employees, to bar anyone who has by his assertion of the constitutional privilege against self-incrimination thwarted or attempted to hinder an investigation vital to the protection of the state. Similar provisions are found in the United States Code. See 18 U.S.C. 205, 216, 281, which involves acceptance of bribes by members of Congress; similarly 18 U.S.C. 202, acceptance of bribes by other governmental officials; and 18 U.S.C. 2381, which involves a permanent proscription from any opportunity to serve in the government for anyone convicted of treason.

This act does not impinge on the constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. The protection against self-incrimination is granted by the Constitution of the State of

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New York (Art I, § 6). The state may, if a sound basis exists, require a public employee to forego the exercise of this right. *Adamson* v. *California*, 332 U. S. 46; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319.

5. An employee whose services are terminated pursuant to Charter § 903 is not without judicial remedy in New York State.

A public employee who is deemed by his employer to have separated himself from government service by refusing to answer proper questions asked by a duly constituted body, on the basis of self-incrimination, is not without judicial remedy. He may seek a determination from the courts as to whether or not he falls within the purview of § 903 of the New York City Charter. He may contend that he is not a public employee, within the meaning of the statute; that the legislative body is not duly constituted to conduct its inquiry; or that such inquiry does not properly relate to the property, government or affairs of the city, or the official conduct of its employees (New York Civil Practice Act, Article 78 §§ 1283-1306).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 54

MICHAEL J. REGAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK

Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel, sponsors this brief on behalf of the City of New York. *Rules of the Supreme Court, Rule 42, subd. 4; New York City Charter § 394.* The Corporation Counsel was unaware of this case, a criminal proceeding, until November 17, 1954, the day prior to oral argument before this Court. On oral argument permission was granted to the parties to submit briefs on the constitutionality of § 903 of the New York City Charter. The Corporation Counsel submits this brief *amicus curiae* on this issue.

CONCLUSION

The obligations imposed on public employees pursuant to Charter § 903 are not arbitrary or unreasonable conditions of employment. The order appealed from should be affirmed and this appeal dismissed.

New York, December 2, 1954.

Respectfully submitted,

ADRIAN P. BURKE,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
of Counsel.

The Interest of the *Amicus*

The City of New York employs more than 200,000 persons who serve in the various departments, agencies and subdivisions of the local government, including more than 38,000 public school teachers. The provisions of New York City Charter § 903 which, as a condition of employment, require a public employee to answer any pertinent inquiries of a duly constituted investigating body and precludes a refusal to testify, on the basis of self-incrimination, are applicable to each of these employees. Accordingly, the City of New York is vitally concerned in sustaining the decisions of the New York state courts which have sustained the separation from public employment of public employees who violated this section.

In the instant case the petitioner has challenged the constitutionality of § 903 as being violative of the due process guaranteed him by the Fourteenth Amendment. The constitutionality of this section is of vital importance to the protection of the community from the dishonest or disloyal public employee.

The Statute Involved

New York City Charter, § 903 provides as follows:

> "**Failure to testify.** If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate

APPENDIX A

New York City Charter, Laws of 1934, Chapter 867, Adopted by Referendum on November 3, 1936, Effective January 1, 1938.

§ 887. Corrupt Practices.—No councilman or other officer or employee of the city shall give or promise to give any portion of his compensation or any money or valuable thing to any person, in consideration of his having been or being nominated, appointed, elected or employed as such officer or employee, under the penalty of forfeiting his office or employment and being forever disqualified from being elected, appointed or employed in the service of the city, and shall on conviction be punished for a misdemeanor.

§ 888. Political Contributions.—No councilman or other officer or employee of the city shall, directly or indirectly, pay or promise to pay any political assessment, subscription or contribution under the penalty of forfeiting his office or employment. Any violation of this section shall be a misdemeanor.

§ 895. Officer Not to Hold Any Other Civil Office.—Any person holding office, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioners for the taking of bail, or of the state, except the office of notary public or commissioner of deeds or officer of the national guard, or who shall hold or accept any other office connected with the government of the city, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated any office held by him under the city government; except that the mayor may

him or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

The Question Presented

May the State, cognizant of the benefits, tenure and stability of public employment, and endeavoring to secure the full cooperation of its personnel on matters affecting the State, establish as a qualification of employment the requirement that employees forego the plea of self-incrimination as a basis for refusal to testify before duly constituted government bodies?

SUMMARY OF ARGUMENT

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment calculated to assure honesty and loyalty in its employees.

1. **Public employment in New York State confers advantages with concurrent obligations which distinguish it from private employment.**
2. **Historical background of Charter § 903.**
3. **New York State Court of Appeals sanction of Charter § 903.**
4. **This Court has sustained the right of the state to protect itself by promulgating reasonable conditions of employment.**
5. **An employee whose services are terminated pu suant to Charter § 903 is not without judicial remedy in New York State.**

accept, or may in writing authorize any other person holding office to accept, a specified civil office, in respect to which no salary or other compensation is provided. No person shall hold two city or county offices, except as expressly provided in this charter or by statute; nor shall any officer under the city government hold or retain an office under a county government, except when he holds such office ex officio by virtue of an act of the legislature, and in such case shall draw no salary for such ex officio office.

§ 896. Fraud of Officer.—Any councilman or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to his office or employment, or commit any fraud upon the city, or convert any of the public property to his own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit his office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.

§ 901. Punishment for False Returns and Deceptive Reports.—Any officer or employee of the city who shall knowingly make a false or deceptive report or statement in the course of his duty or shall, except as in this charter otherwise provided, receive compensation except from the city for performing any official duty, or shall accept or receive any gratuity from any person whose interests may be affected by his official action, shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment.